STATE OF INDIANA

Mitchell E. Daniels, Jr.
Governor

STATE BUDGET AGENCY
212 State House
Indianapolis, Indiana 46204-2796
317/232-5610

Adam M. Horst
Director

July 13, 2011

MaryAnn Stevens
Senior Environmental Manager
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue N1255
Indianapolis, IN 46204

Dear Ms. Stevens:

Pursuant to the provisions of Executive Order 2-89 and Budget Agency Financial Management Circular 2010-4, the State Budget Agency has reviewed the proposed rule to amend 327 IAC 2 and 327 IAC 5, (LSA # 08-764) which you submitted to the State Budget Agency on May 6, 2011.

After reviewing the proposed rule, the recommendation of the State Budget Agency is that the rule changes be approved.

Furthermore, the statement and analysis (attached hereto) provided by the Indiana Department of Environmental Management is hereby adopted as the Office of Management and Budget's own Fiscal Impact Statement for the purpose of satisfying the requirements under IC 4-22-2-28(d). Also, it is adopted as the Office of Management and Budget's cost benefit analysis under IC 4-3-22-13(a).

If you have questions concerning this action, please contact your budget analyst or Gayle Pierson at 232-5610.

Sincerely,

A M Horst

Adam M. Horst
Director

AMH/GP

INDIANA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
We Protect Hoosiers and Our Environment.

Mitchell E. Daniels Jr.
Governor

Thomas W. Easterly
Commissioner

100 North Senate Avenue
Indianapolis, Indiana 46204
(317) 232-8603
Toll Free (800) 451-6027
www.idem.IN.gov

MEMORANDUM

TO: Adam M. Horst
Director
State Budget Agency

FROM: Nancy King
Branch Chief
Office of Legal Counsel, Rules Development Branch

SUBJECT: Fiscal Impact Analysis for Rule #08-764

Date submitted to SBA/OMB: May 6, 2011

Date of publication of first notice of rulemaking: October 15, 2008

Rule Summary: New Rule and Amendments to Rules concerning antidegradation standards and implementation procedures.

This rulemaking will adopt new rules and amend existing rules to establish the antidegradation standards and implementation procedures for Indiana.

The Clean Water Act (33 U.S.C. 1313(c)) and federal rules require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. Additional requirements affecting antidegradation rules come from the Indiana General Assembly's requirements found in IC 13-18-3 enacted in the 2000 legislative session under Public Law 140-2000 (also known as SEA 431). The General Assembly adopted additional antidegradation requirements, in the 2009 regular session with the passage of Public Law 78-2009, which are made part of the draft rule.

The federal rules require states to have, at a minimum, three tiers of antidegradation. Tier 1 (40 CFR 131.12(a)(1)) protects existing uses by providing the absolute floor of water quality in all waters of the United States. Tier 2 (40 CFR 131.12(a)(2)) applies to waters whose quality exceeds that necessary to protect the Section 101(a)(2) goals of the Clean Water Act (criteria, 33 U.S.C. 1251(a)(2)). In this case, water quality may not be lowered to less than the level necessary to fully protect the "fishable/swimmable" uses and other existing uses. Water quality in Tier 2 waters may only be lowered after a determination is made that allowing lowered water quality is necessary and will accommodate important economic or social development in the area in which the waters are located. Any such lowering must still assure water quality adequate to protect existing uses fully. Tier 3 (40 CFR 131.12(a)(3)) applies to outstanding national resource waters (ONRWs) where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. States may allow some limited activities that result in temporary and short-term changes in water quality in the

ONRW, but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW. Currently, Indiana has no ONRWs.

Attachments: SBA Rule Promulgation Submission Form
Draft Rule (with changes in response to second notice comments received to the draft rule posted in the Indiana Register)
Fiscal Impact Analysis on State and Local Government (FMC 2010-4)
Cost Benefit Analysis (IC 4-3-22-13; IC 4-22-2-28; FMC 2010-4)
IC 13-14-9-3 First Notice of Rulemaking
Small Business Economic Impact Statement (IC 4-22-2.1-1)

State Budget Agency Rule Promulgation Submission Form

1. Notice of Intent File Date: First Notice of Comment Period: October 15, 2008, Indiana Register (DIN: 20081015-IR-327080764FNA)

2. LSA Document Number: #08-764

3. Primary Point of Contact:

Name: MaryAnn Stevens
Agency: IDEM
Phone: 317-232-8635
Email: mstevens@idem.in.gov

4. Statutory Authority for Rule Promulgation: IC 13-14-8; IC 13-14-9

5. Agency requests an expedited review of the proposed rule. (See page 5 of FMC #2010-4 for more information regarding the expedited review process.)

Yes X No ____

Explain reason(s) an expedited review is necessary, including any relevant dates associated with external deadlines:

This rulemaking for antidegradation implementation procedures has been very controversial which has caused the process to become lengthy. The stakeholders and public have made jabs at IDEM, the state of Indiana, the governor, etc., for how long the process has taken already and we aren't yet to a final rule so it would be helpful to streamline any steps yet to occur in getting to the final rule. As it is, Indiana has long been in violation of federal rules for not having an antidegradation implementation rule in place.

6. Submit to SBA/OMB via SBARules@sba.IN.gov. Please include supporting materials listed below.

Submission Checklist:

- X SBA Rule Promulgation Submission Form (this form)
- X Cover Letter
- X Draft Rule (with changes in response to second notice comments received to the draft rule posted in the Indiana Register)
- X Fiscal Impact Analysis on State and Local Government (FMC 2010-4)
- X Cost Benefit Analysis (IC 4-3-22-13, IC 4-22-2-28, FMC 2010-4)
- X The Notice of Intent (IC 4-22-2-23) or, if applicable, the relevant notice from IC 13-14
- X Small Business Economic Impact Statement (IC 4-22-2.1-1)

DRAFT RULE

SECTION 1. 327 IAC 2-1.3 IS ADDED TO READ AS FOLLOWS:

Rule 1.3. Antidegradation Standards and Implementation Procedures

327 IAC 2-1.3-1 Applicability of antidegradation standards and implementation procedures

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-18-3; IC 13-18-4

Sec. 1. (a) The antidegradation standards established by this rule apply to all surface waters of the state.

(b) Except as provided under section 4 of this rule, the antidegradation implementation procedures established by this rule apply to a proposed new or increased loading of a regulated pollutant to a surface water of the state that will result from a deliberate action including a change in process or operation that:

(1) adds additional regulated pollutants; or
(2) creates an increase in loading of a regulated pollutant already being discharged.

(c) For activities covered by an NPDES general permit authorized by the department, the following apply:

(1) The department shall complete an antidegradation review of the NPDES general permits.
(2) After an antidegradation review of an NPDES general permit is conducted, activities covered by that NPDES general permit are not required to undergo an additional antidegradation review.

(Water Pollution Control Board; 327 IAC 2-1.3-1)

327 IAC 2-1.3-2 Definitions

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-11-2-265; IC 13-13-1-1; IC 13-18-1; IC 13-18-3-2; IC 14-8-2-310; IC 14-22-34; IC 36-2-3.5; IC 36-3-1

Sec. 2. The following definitions apply throughout 327 IAC 2-1, this rule, and 327 IAC 2-1.5:

(1) "Approved alternate mixing zone volume for Lake Michigan" means the volume associated with the alternate mixing zone for Lake Michigan established according to 327 IAC 5-2-11.4(b) (6) and (7).
(2) "Available loading capacity" means the amount of the total loading capacity not used by point source and nonpoint source discharges considering the following:
(A) The available loading capacity is established at the time the request to lower water quality is considered.
(B) The used loading capacity shall be expressed as the sum of the:
(i) representative background loading rate over a twenty-four (24) hour period; and
(ii) monthly average mass based effluent limitations contained in the existing permit.

(C) The representative background loading rate is the product of the representative background concentration multiplied by the approved alternate mixing zone volume for:

(i) Lake Michigan over a twenty-four (24) hour period; or

(ii) the stream design flow over a twenty-four (24) hour period.

(3) "Best available demonstrated control technology" or "BADCT" means wastewater treatmer capable of meeting the technology-based effluent limit (TBEL) established by the department under 327 IAC 5-5-2 that represents the best cost-effective treatment technology that is readily available.

(4) "Best management practices" or "BMPs" means the following measures to prevent or reduce the pollution of surface waters of the state:

(A) Schedules of activities.

(B) Prohibitions of practice.

(C) Treatment requirements.

(D) Operation and maintenance procedures.

(E) Use of containment facilities.

(F) Other management practices.

BMPs may be employed, for example, to control plant site runoff, spillage or leaks, sludge or waste disposal, or drainage from raw materials storage resulting from manufacturing, commercial, mining, or silvicultural activities.

(5) "Bioaccumulation" means the net accumulation of a substance by an organism as a result of uptake from all environmental sources.

(6) "Bioaccumulation factor" or "BAF" means the ratio (in liters per kilogram) of a substance's concentration in tissue of an aquatic organism to its concentration in the ambient water in situations where:

(A) both the organism and its food are exposed; and

(B) the ratio does not change substantially over time.

(7) "Bioaccumulative chemical of concern" or "BCC" has the meaning set forth in 327 IAC 2-1-9 and 327 IAC 2-1.5-6.

(8) "Board" means the water pollution control board established under IC 13-18-1.

(9) "CERCLA" means the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 through 42 U.S.C. 9675, as effective December 2010.

(10) "Clean Water Act" or "CWA" means the Federal Water Pollution Control Act, 33 U.S.C. 1251 et seq., as amended on October 8, 2008.

(11) "Combined sewer" means a sewer designed and employed to receive both of the following:

(A) Water-carried or liquid wastes.

(B) Storm or surface water.

(12) "Commissioner" means the commissioner of the department.

(13) "Criterion" means a definite numerical value or narrative statement promulgated by the board to maintain or enhance water quality to provide for and fully protect designated uses of the surface waters of the state.

(14) "Degradation" means, for purposes of an antidegradation demonstration, the following:

(A) For an ONRW, any new or increased discharge of a regulated pollutant, except for a short-term, temporary increase as described under section 4(a) of this rule.

(B) For an HQW, including an OSRW, but excluding an ONRW, any new or increased loading of a regulated pollutant, except as provided under section 4 of this rule, to a surface water of the state that results in a significant lowering of water quality for that regulated pollutant.

(15) "Department" means the department of environmental management established under IC 13-13-1-1.

(16) "Designated uses" means those uses specified in the water quality standards at:

(A) 327 IAC 2-1-3; and

(B) 327 IAC 2-1.5-5;

for each waterbody whether or not they are being attained.

(17) "Discharge" or "direct discharge", when used without qualification, means a discharge of a regulated pollutant.

(18) "Draft permit" means a document prepared by the commissioner under 327 IAC 5-3-6 before the public comment period indicating the commissioner's tentative decision to:

(A) issue or deny;

(B) modify;

(C) revoke and reissue;

(D) terminate; or

(E) reissue;

a permit.

(19) "Effluent" means a wastewater discharge from a point source to the surface waters of the state.

(20) "Effluent limitation" means any restriction established by the commissioner on:

(A) quantities;

(B) discharge rates; and

(C) concentrations;

of pollutants that are discharged, or will be discharged, from point sources into surface waters of the state.

(21) "Existing uses" means those uses actually attained in the waterbody on or after November 28, 1975, whether or not they are included under 327 IAC 2-1-3 or 327 IAC 2-1.5-5.

(22) "Governmental entity" means the state or a political subdivision.

(23) "Great Lakes" means, in Indiana, the following:

(A) Lake Erie.

(B) Lake Michigan.

(24) "High quality water" or "HQW" means a waterbody, including an ONRW or OSRW, in which, on a pollutant by pollutant basis, the quality of the surface water exceeds levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water. The term includes any waterbody for which the pollutant has not been detected in:

(A) the water column; or

(B) nontransient aquatic organisms;

at levels that would indicate that a water quality criterion is not being met.

(25) "Indirect discharger" means a discharger introducing nondomestic waste pollutants into a POTW.

(26) "Lake Michigan" means the Indiana portion of the open waters of Lake Michigan.

(27) "Legislative body" means any of the following:

(A) For a county not subject to IC 36-2-3.5 or IC 36-3-1, a board of county commissioners.

(B) For a county subject to IC 36-2-3.5, a county council.

(C) For a consolidated city or a county having a consolidated city, a city council.

(D) For a city other than a consolidated city, a common council.

(E) For a town, a town council.

(F) For a township, a township board.

(28) "Mixing zone", for the purposes of this rule, means an area contiguous to a discharge where the:

(A) discharged wastewater mixes with the receiving water or waters; and

(B) numeric water quality criteria may be exceeded.

Where the quality of the effluent is lower than that of the receiving water, it may not be possible to attain within the mixing zone all designated uses attained outside the zone.

(29) "National Pollutant Discharge Elimination System" or "NPDES" means the national program for:

(A) issuing;

(B) modifying;

(C) revoking and reissuing;

(D) terminating;

(E) denying;

(F) monitoring; and

(G) enforcing;

permits for the discharge of pollutants from point sources and imposing and enforcing pretreatment requirements by the U. S. EPA or an authorized state under Sections 307, 318, 402, and 405 of the CWA. The term includes a state program approved by the U. S. EPA under 40 CFR 123.

(30) "Open waters of Lake Michigan" means the following:

(A) The surface waters within Lake Michigan lakeward from a line drawn across the mouth of tributaries to the lake, including all surface waters enclosed by constructed breakwaters.

(B) For the Indiana Harbor Ship Canal, the boundary of the open waters of Lake Michigan is delineated by a line drawn across the mouth of the harbor from the East Breakwater Light (1995 United States Coast Guard Light List No. 19675) to the northernmost point of the shore line along the west side of the harbor.

(31) "Outstanding national resource water" or "ONRW" means a water designated as such by the general assembly after recommendations by the board and the environmental quality service council under IC 13-18-3-2(n) and IC 13-18-3-2(o). The designation must describe the quality of the ONRW to serve as the benchmark of the water quality that shall be maintained and protected. Waters that may be considered for designation as ONRWs include waterbodies that are recognized as any of the following:

(A) Important because of protection through official action, such as any of the following:

(i) Federal or state law.

(ii) Presidential or secretarial action.

(iii) International treaty.

(iv) Interstate compact.

(B) Having:

(i) exceptional:

(AA) recreational; or

(BB) ecological;

significance; or

(ii) other special:

(AA) environmental;

(BB) recreational; or

(CC) ecological;

attributes.

(C) Waters with respect to which designation as an ONRW is reasonably necessary for protection of other waterbodies designated as ONRWs.

(32) "Outstanding state resource water" or "OSRW" means any water designated as such by the board regardless of when the designation occurred or occurs. Waters that may be considered for designation as OSRWs include waterbodies that have unique or special:

(A) ecological;

(B) recreational; or

(C) aesthetic;

significance.

(33) "Parameter" means a quantitative or characteristic element that describes:

(A) physical;

(B) chemical; or

(C) biological;

conditions of water.

(34) "Permit" means:

(A) a permit;

(B) a license;

(C) a registration;

(D) a certificate; or

(E) any other type of authorization required before construction or operation;

that may be issued by the commissioner under pollution control laws or environmental management laws.

(35) "Permittee" means the holder of a permit.

(36) "Person" means any of the following:

(A) An individual.

(B) A partnership.

(C) A copartnership.

(D) A firm.

(E) A company.

(F) A corporation.

(G) An association.

(H) A joint stock company.

(I) A trust.

(J) An estate.

(K) A municipal corporation.

(L) A city.

(M) A school city.
(N) A town.
(O) A school town.
(P) A school district.
(Q) A school corporation.
(R) A county.
(S) Any consolidated unit of government.
(T) A political subdivision.
(U) A state agency.
(V) A contractor.
(W) Any other legal entity.

(37) "Point source" means any discernible, confined, and discrete conveyance, including, but not limited to, any of the following from which pollutants are or may be discharged:

(A) A pipe.
(B) A ditch.
(C) A channel.
(D) A tunnel.
(E) A conduit.
(F) A well.
(G) A discrete fissure.
(H) A container.
(I) Rolling stock.
(J) A concentrated animal feeding operation.
(K) A landfill leachate collection system.
(L) A vessel.
(M) Any other floating craft.

The term does not include return flows from irrigated agriculture or agricultural storm runoff. See 327 IAC 5-2-4 for other exclusions.

(38) "Pollutant" means any of the following when discharged into water:

(A) Dredged spoil.
(B) Solid waste.
(C) Incinerator residue.
(D) Filter backwash.
(E) Sewage.
(F) Garbage.
(G) Sewage sludge.
(H) Munitions.
(I) Chemical wastes.
(J) Biological materials.
(K) Radioactive materials.
(L) Heat.
(M) Wrecked or discarded equipment.
(N) Rock.
(O) Sand.
(P) Cellar dirt.
(Q) Industrial, municipal, or agricultural waste.

(39) "Pollution prevention" means the term as defined by the U. S. EPA under the following:

(A) The federal Pollution Prevention Act, 42 U.S.C. 13101 et seq.

(B) The U. S. EPA pollution prevention policy statement (June 15, 1993).

(40) "Privately owned treatment works" means any device or system:

(A) including recycling and reclamation, used in the treatment of:

(i) municipal sewage; or

(ii) industrial wastes; and

(B) that is not a POTW.

(41) "Publicly owned treatment works" or "POTW" means any device or system, including recycling and reclamation, used in the treatment of:

(A) municipal sewage; or

(B) industrial wastes;

that is owned by a state or municipality. The term includes sewers, pipes, or other conveyances only if they convey wastewater to a POTW providing treatment.

(42) "RCRA" means the Resource Conservation and Recovery Act, 42 U.S.C. 6901 through 42 U.S.C. 6992k, as effective December 2010.

(43) "Regulated pollutant" means any:

(A) parameter:

(i) for which water quality criteria have been adopted in or developed pursuant to 327 IAC 2-1 and 327 IAC 2-1.5;

(ii) including:

(AA) narrative and numeric criteria; and

(BB) nutrients, specifically phosphorus and nitrogen; and

(iv) excluding:

(AA) biological criteria;

(BB) pH; and

(CC) dissolved oxygen; and

(B) other parameter that may be limited in an NPDES permit as a result of, but not limited to:

(i) best professional judgment;

(ii) new source performance standards;

(iii) best conventional pollutant control technology;

(iv) best available technology economically achievable; or

(v) best practicable control technology currently available;

for the appropriate categorical guidelines of 40 C.F.R. 400 to 40 C.F.R. 471.

(44) "Representative background concentration" means a value based upon a data set and determined according to 327 IAC 5-2-11.4(a)(8).

(45) "Risk" means the probability that a regulated pollutant, when released into the environment, will cause an adverse effect in exposed humans or other living organisms.

(46) "Sanitary sewer" means a sewer, to which storm, surface, and ground waters are not intentionally allowed to enter, that conveys liquid and water-carried wastes from the following:

(A) Residences.

(B) Commercial buildings.

(C) Industrial plants.

(D) Institutions.

(47) "Sanitary wastewater" means the liquid and water-carried waste from:

(A) residences;

(B) commercial buildings;

(C) industrial plants;

(D) institutions; and

(E) other places of human occupancy;

that is transported by sewers and is primarily composed of human and household waste. Sanitary wastewater, as received by a POTW, may contain a component of industrial waste.

(48) "Sewage" means all refuse, human excreta, garbage, waste, or waste products or any combination of these substances that:

(A) is potentially capable of contaminating the environment; and

(B) may be collected and carried off in a:

(i) pipe;

(ii) ditch; or

(iii) channel.

(49) "Sewer" means a pipe or conduit that carries wastewater or drainage water.

(50) "Significant lowering of water quality" means:

(A) there is a new or increased loading of a regulated pollutant to a surface water of the state that results in an increase in the ambient concentration of the regulated pollutant and the increased loading is greater than a de minimis lowering of water quality; and

(B) none of the provisions of section 4 of this rule applies.

(51) "Stream design flow" means the stream flow that represents critical conditions, upstream from the source as defined in 327 IAC 5-2-11.1(b) and 327 IAC 5-2-11.4(b)(3), for protection of:

(A) aquatic life;

(B) human health; or

(C) wildlife.

(52) "Threatened or endangered species" means the following:

(A) Species and designated critical habitat listed under Section 4 of the ESA*.

(B) Species listed as state threatened or endangered by the Indiana department of natural resources under IC 14-22-34.

(C) Species designated as state threatened or endangered species in the August 18, 2010 database for endangered, threatened, rare, and special concern species maintained by the Indiana natural heritage data center, division of nature preserves, department of natural resources.**

(53) "Total loading capacity" expressed as a mass loading rate per twenty-four (24) hour period, for the waterbody in the area where the water quality is proposed to be lowered means the product of the applicable water quality criterion multiplied by the sum of the:

(A) existing effluent flow;

(B) proposed new or increased effluent flow; and

(C) approved alternate mixing zone volume for:

(i) Lake Michigan over a twenty-four (24) hour period; or

(ii) the stream design flow over a twenty-four (24) hour period.

(54) "Toxic substances" means substances that are or may become harmful to:

(A) aquatic life;

(B) humans;

(C) other animals;

(D) plants; or

(E) food chains;

when present in sufficient concentrations or combinations. The term includes those substances identified as toxic under Section 307(a)(1) of the CWA.

(55) "Unit of government" means a:

(A) county;

(B) municipality;

(C) township; or

(D) state.

(56) "Wastewater" means the following:

(A) Human excreta, water, scum, sludge, and sewage from:

(i) sewage disposal systems;

(ii) retained contents of wastewater holding tanks; or

(iii) portable sanitary units.

(B) Grease, fats, and retained wastes from grease traps or interceptors.

(C) Wastes carried in liquid from ordinary living processes.

(D) Incidental or accidental seepage from sewage disposal systems.

(57) "Waters" or "waters of the state" has the meaning set forth in IC 13-11-2-265.

(58) "Watershed" has the meaning set forth in IC 14-8-2-310.

(59) "Whole effluent toxicity" or "WET" means the aggregate toxic effect of an effluent measured directly by a toxicity test performed in accordance with the approved methodologies under 40 C.F.R. Part 136.

***Section 4 of the ESA is incorporated by reference and may be obtained from the Superintendent of Documents, Government Printing Office, Washington, D.C. 20402 or from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana 46206.**

****The database for endangered, threatened, rare, and special concern species is incorporated by reference and is updated regularly. Information from the database may be obtained from the Indiana Department of Environmental Management, Office of Water Quality, Indiana Government Center North, 100 North Senate Avenue, Indianapolis, Indiana 46206.** ***(Water Pollution Control Board; 327 IAC 2-1.3-2)***

327 IAC 2-1.3-3 Antidegradation standards

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18

Affected: IC 13-18-3-2; IC 13-18-4

Sec. 3. (a) The Tier 1 antidegradation standard is as follows:

(1) For all surface waters of the state, existing uses and the level of water quality necessary to protect existing uses shall be maintained and protected. To ensure this standard is met, the commissioner shall do the following:

(A) Ensure that the level of water quality necessary to protect existing uses is maintained. In order to achieve this requirement, water quality standards use designations must include all existing uses.

(B) Establish controls as necessary on nonpoint sources, where authority exists, and point sources of regulated pollutants to ensure the following:

(i) The criteria applicable to the designated use are achieved in the water.

(ii) Any designated use of a downstream water is maintained and protected.

(2) Where designated uses of waters are impaired:

(A) there shall be no additional lowering of the water quality with respect to the regulated pollutants that are causing the impairment; and

(B) to ensure the standard under clause (A) is met, the commissioner shall not allow a lowering of water quality for the regulated pollutants that prevents the attainment of the:

(i) designated use; or

(ii) water quality criterion.

(b) The Tier 2 antidegradation standard for HQWs that are not ONRWs or OSRWs is as follows:

(1) The surface waters of the state where existing quality for any parameter is better than the water quality criteria for that parameter established in 327 IAC 2-1-6 or 327 IAC 2-1.5-8 shall be considered high quality for that parameter consistent with the definition of HQW.

(2) This high quality of water shall be maintained and protected unless the commissioner finds, after full satisfaction of intergovernmental coordination and public participation and the provisions in section 5 of this rule, that allowing a significant lowering of water quality is necessary and provides important economic or social development in the area in which the surface waters are located. In allowing a significant lowering of water quality, the commissioner shall assure the following:

(A) Water quality adequate to fully protect existing uses is maintained.

(B) The highest statutory and regulatory requirements for all new and existing point sources are applied.

(C) Where authority exists, all cost-effective and reasonable BMPs for nonpoint source control are employed.

(c) The Tier 2.9 antidegradation standard for HQWs that are OSRWs is as follows:

(1) For OSRWs inside the Great Lakes basin, no new or increased loading of a BCC except mercury shall be allowed that causes a significant lowering of water quality of the OSRW.

(2) For mercury in OSRWs inside the Great Lakes basin, BCCs in OSRWs outside the Great Lakes basin, and non-BCCs in all OSRWs, the following apply:

(A) These waters shall be maintained and protected in their present high quality unless the commissioner finds, after full satisfaction of:

(i) intergovernmental coordination and public participation; and

(ii) the provisions in sections 5 and 7 of this rule;

that allowing a significant lowering of water quality is necessary and provides important economic or social development in the area in which the surface waters are located.

(B) In allowing a significant lowering of water quality, the commissioner shall assure the following:

(i) Water quality adequate to fully protect existing uses is maintained.

(ii) The highest statutory and regulatory requirements for all new and existing point sources are applied.

(iii) Where authority exists, all cost-effective and reasonable BMPs for nonpoint source control are employed.

(3) For OSRWs, any new or increased loading of a regulated pollutant that results in a significant lowering of water quality for that regulated pollutant shall be prohibited, unless the:

(A) activity causing the increased loading:

(i) results in an overall improvement in water quality in the OSRW; and

(ii) meets the applicable requirements of this section; or

(B) person proposing the increased loading implements or funds a water quality improvement project in accordance with IC 13-18-3-2 in the watershed of the OSRW that:

(i) results in an overall improvement in water quality in the OSRW; and

(ii) meets the applicable requirements of this section.

(d) The Tier 3 antidegradation standard for HQWs that are ONRWs is the following:

(1) These waters shall be maintained and protected in their present high quality without degradation except for short-term, temporary discharges as described in section 4(a) of this rule.

(2) To ensure the antidegradation standard under subdivision (1) is met, the following requirements apply:

(A) A deliberate action that:

(i) is not exempt under section 4 of this rule; and

(ii) results in a new or increased loading from an existing or new discharger;

is prohibited.

(B) A discharge to a tributary of an ONRW that is not exempt under section 4 of this rule shall not be allowed if it would cause an increase in the ambient concentration of that pollutant in the ONRW.

(e) Except for ONRWs, any determination made by the commissioner in accordance with Section 316 of the CWA concerning alternative thermal effluent limitations shall be considered to be consistent with the antidegradation standards contained in this section. ***(Water Pollution Control Board; 327 IAC 2-1.3-3)***

327 IAC 2-1.3-4 Exemptions from the antidegradation demonstration requirements

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18

Affected: IC 13-11-2-24; IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 4. (a) For an ONRW or OSRW inside the Great Lakes basin, an exemption from the antidegradation demonstration requirements included in section 5 of this rule shall be allowed for short-term, temporary, new, or increased discharges of mercury and non-BCCs if the following conditions are met:

(1) All reasonable methods for minimizing or preventing the new or increased loading have been taken.

(2) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.

(3) A proposed new or existing discharger applies for and receives authorization from the commissioner.
(4) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
(5) The discharge complies with the antidegradation standards contained in section 3 of this rule.

(b) For an HQW except an ONRW or OSRW inside the Great Lakes basin, an exemption from the antidegradation demonstration requirements included in section 5 of this rule shall be allowed for short-term, temporary, new, or increased discharges if the following conditions are met:
(1) All reasonable methods for minimizing or preventing the new or increased loading have been taken.
(2) The discharge will last less than twelve (12) months or three hundred sixty-five (365) days.
(3) A proposed new or existing discharger applies for and receives authorization from the commissioner.
(4) The discharge will result only in a short-term, temporary (not to exceed twelve (12) months) lowering of water quality.
(5) The discharge complies with the antidegradation standards contained in section 3 of this rule.

(c) For an HQW except an ONRW, a new or increased loading of a regulated pollutant resulting from the following is exempt from the antidegradation demonstration requirements included in section 5 of this rule:
(1) A new or increased loading of a non-BCC that is a demonstrated de minimis lowering of water quality as shown by the submission of sufficient information that allows the commissioner to verify the de minimis as determined according to the following:
(A) Calculation considerations according to the following:
(i) The proposed net increase in the loading of a regulated pollutant is less than or equal to ten percent (10%) of the available loading capacity determined at the time of the specific proposed new or increased loading of the regulated pollutant. The available loading capacity shall be established at the time of each request for a new or increased loading of a regulated pollutant.
(ii) The benchmark available loading capacity is equal to ninety percent (90%) of the available loading capacity established at the time of the request for the initial increase in the loading of a regulated pollutant.
(iii) For every request after the time of the request for the initial increase in the loading of a regulated pollutant, the available loading capacity remaining after the net increase in the loading of a regulated pollutant must be greater than or equal to the benchmark available loading capacity.
(B) For heat, except for discharges to Lake Michigan, the following conditions must be satisfied:

(i) The new or increased discharge will not result in an increase in temperature in a stream or an inland lake, outside of the designated mixing zone, where applicable.

(ii) The new or increased discharge will not result in an increase in waste heat of an amount in a stream greater than the amount determined by calculating the number of British thermal units (BTUs) required to raise the temperature of the stream design flow of the receiving stream by one (1) degree Fahrenheit.

(C) For discharges to Lake Michigan, relative to temperature and heat, the following conditions must be satisfied:

(i) The new or increased discharge will not result in an increase in temperature as allowed in 327 IAC 2-1.5-8(c)(4)(D)(iv), at the edge of a one thousand (1,000) foot arc inscribed from a fixed point adjacent to the discharge.

(ii) The new or increased discharge will not result in an increase in waste heat in an amount greater than five-tenths (0.5) billion BTUs per hour.

(2) A new or increased loading that results from one (1) of the following activities that does not require the submission of information beyond what is required to comply with the discharger's existing applicable permit:

(A) A change in loading of a regulated pollutant within the existing capacity and processes that are covered by an existing applicable permit, including, but not limited to, the following:

(i) Normal operational variability, including, but not limited to, intermittent increased loadings due to wet weather conditions.

(ii) A change in intake water pollutants not caused by the discharger.

(iii) Increasing the production hours of the facility, for example, adding a second shift.

(iv) Increasing the rate of production.

(v) A change at an internal outfall that does not directly discharge to a surface water of the state.

(vi) A change in the applicable effluent limitation guideline based on a change in production.

(B) A bypass not prohibited by 327 IAC 5-2-8(11).

(C) A new limit for a regulated pollutant for an existing permitted discharger that will not allow an increase in either the mass or concentration of the regulated pollutant discharged, including a new limit that is a result of one (1) of the following:

(i) New or improved:

(AA) monitoring data; or

(BB) analytical methods.

(ii) New or modified:

(AA) water quality criteria; or

(BB) effluent limitation guidelines, pretreatment standards, or control requirements for POTWs.

(D) An increased loading of a regulated pollutant at an existing outfall discharging to a water of the state due to increasing the sewered area, connection of new sewers and users, or acceptance of trucked-in wastes, such

as septage and holding tank wastes, by a POTW, provided the following are true:

(i) There is no increase in the existing NPDES permit limits.

(ii) There is no increase beyond the treatment capacity of the facility.

(iii) There is no significant change expected in the characteristics of the wastewater discharged.

(iv) There is no increased loading of BCCs from nondomestic wastes.

(Water Pollution Control Board; 327 IAC 2-1.3-4)

327 IAC 2-1.3-5 Antidegradation demonstration

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18

Affected: IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 5. (a) Any existing or proposed discharger seeking a new or increased discharge that constitutes a significant lowering of water quality that is not exempt under section 4 of this rule must submit for consideration by the commissioner an antidegradation demonstration that justifies that the proposed new or increased discharge is necessary and provides a social or economic benefit in the area of the discharge. Each antidegradation demonstration shall include the following basic information:

(1) The regulated pollutants proposed to be discharged.

(2) The estimated mass and concentration of all regulated pollutants proposed to be discharged.

(3) The receiving water or waters that would be affected by the new or increased discharge.

(4) The physical, biological, and chemical conditions of the receiving water or waters as determined by:

(A) available information; or

(B) additional information, including, if requested by the department, the results of additional water quality analysis such as:

(i) chemical analysis;

(ii) biological analysis; or

(iii) both items (i) and (ii).

(b) An antidegradation demonstration that includes the basic information required under subsection (a) and the necessary information required under subsection (c) shall be submitted for the following beneficial activities that result in a new or increased discharge:

(1) A change in loading of a regulated pollutant due solely to implementation of:

(A) enforceable municipal or industrial controls on wet weather flows, including combined sewer overflows; or

(B) an enforceable individual NPDES permit for storm water associated with industrial activity;

when there is no net increase in the quantity and concentration of the regulated pollutant discharged to the same ten (10) digit watershed.

(2) A new or increased loading of a regulated pollutant due to one (1) or more of the following:

(A) A response action under CERCLA, as defined in IC 13-11-2-24, as amended.

(B) A corrective action under RCRA, as amended.

(C) An action utilizing federal or state authorities with regulations to alleviate a release into the environment of hazardous substances, pollutants, or contaminants that may pose an imminent or existing and substantial danger to public health or welfare, including one (1) or more of the following:

(i) An underground storage tank (UST) corrective action under IC 13-23-13.

(ii) A remediation of petroleum releases under IC 13-24-1.

(iii) A voluntary remediation under IC 13-25-5.

(iv) An abatement or correction of any polluted condition under IC 13-18-7.

(3) A new or increased discharge of noncontact cooling water that will not do the following:

(A) Increase the temperature of the receiving water or waters outside of the designated mixing zone, where applicable.

(B) Increase the loading of BCCs.

(C) Require numeric water quality-based effluent limitations (WQBELs) for toxic substances or WET as determined under 327 IAC 5-2-11.5.

(4) A new or increased loading of an approved non-BCC water treatment additive.

(5) A change in loading of a regulated pollutant:

(A) where there is a voluntary, simultaneous, enforceable decrease in the actual loading of the regulated pollutant from sources contributing to the same ten (10) digit watershed; and

(B) with the result that there is a net decrease in the loading of the regulated pollutant to the same ten (10) digit watershed.

(6) A new or increased loading of a regulated pollutant from a sanitary wastewater treatment plant constructed or expanded to alleviate a public health concern, for example, a connection of existing residences currently on septic systems.

(c) For each regulated pollutant in the proposed new or increased discharge associated with activities in subsections (b), (d), and (f), each antidegradation demonstration shall include the following necessary information:

(1) The availability, reliability, cost-effectiveness, and technical feasibility of the following:

(A) Nondegradation.

(B) Minimal degradation.

(C) Degradation mitigation techniques or alternatives.

(2) An analysis of the effluent reduction benefits and water quality benefits associated with the degradation mitigation techniques or alternatives required to be assessed under subdivision (1)(C), including the following:

(A) A review of pollution prevention alternatives and techniques that includes the following:

(i) A listing of alternatives and techniques, including new and innovative technologies.

(ii) A description of how the alternatives and techniques available to the applicant would minimize or prevent the proposed significant lowering of water quality.

(iii) The effluent concentrations attainable by employing the alternatives and techniques.

(iv) The costs associated with employing the alternatives and techniques.

(v) An identification of the pollution prevention alternatives and techniques selected to be employed and an explanation of why those selections were made.

(B) An evaluation of the feasibility and costs of connecting to an existing POTW or privately owned treatment works, within the vicinity of the proposed new or increased discharge, that:

(i) will effectively treat the proposed discharge; and

(ii) is willing to accept wastewater from other entities.

(C) For POTWs, if the proposed significant lowering of water quality is a result of a proposed new or increased discharge from one (1) or more indirect dischargers, the analysis shall also include the following:

(i) The requirements of clause (A) shall be completed for the indirect discharger or dischargers as well as for the POTW. The POTW may require the indirect dischargers to prepare this information.

(ii) If one (1) or more of the indirect dischargers proposes or does discharge to a combined sewer or sanitary sewer that is connected to a combined sewer, all combined sewer overflows (CSOs) between the point of discharge to the sewer and the POTW shall be identified.

(3) The availability, cost-effectiveness, and technical feasibility of central or regional sewage collection and treatment facilities, including long-range plans for discharges outlined in:

(A) state or local water quality management planning documents; and

(B) applicable facility planning documents.

(4) The availability, cost-effectiveness, and technical feasibility of discharging to another waterbody that:

(A) is not an OSRW; or

(B) has a higher assimilative capacity.

(d) An antidegradation demonstration that includes the basic information required under subsection (a), the necessary information required under subsection (c), and the alternatives analysis information required under subsection (e) shall be submitted for the following beneficial activities that result in a new or increased discharge:

(1) A new or increased loading of a regulated pollutant where the following are true:

(A) The new or increased loading is necessary to accomplish a reduction in the loading of another regulated pollutant.

(B) There will be an improvement in water quality in the receiving water or waters. An improvement in water quality will occur if the impact from the new or increased loading of the regulated pollutant is:

(i) less bioaccumulative; and

(ii) less toxic than the reduced pollutant or pollutant parameter.

In making these determinations regarding bioaccumulation, the BAF methodology under 327 IAC 2-1.5-13 will be used.

(2) A new or increased loading of a regulated pollutant where:

(A) the new or increased loading is necessary to accomplish a reduction in the release of one (1) or more air pollutants; and

(B) there will be an environmental improvement that will occur when the applicant demonstrates that the reduction in the loading of the air pollutant:

(i) is necessary to meet a state or federal air quality standard or emission requirement; or
(ii) will substantially reduce human exposure to hazardous air pollutants or other air pollutants that are subject to state or federal air quality standards.

(e) For each regulated pollutant in the proposed new or increased discharge associated with activities in subsections (d) and (f), each antidegradation demonstration shall include the information required by one (1) of the following alternatives analyses:

(1) The identification of an accepted effluent limit based on BADCT, when available, as established by the department.

(2) A discussion of the following:

(A) The alternative or enhanced treatment techniques selected to be employed.

(B) An explanation of why the alternative or enhanced treatment techniques selected in clause (A) were made.

(C) The reliability of the selected treatment alternative or alternatives, including, but not limited to, the possibility of recurring operational and maintenance difficulties that would lead to increased degradation.

(f) Any existing or proposed discharger seeking a new or increased discharge that constitutes a significant lowering of water quality that is not exempt under section 4 of this rule and is not a beneficial activity identified under subsections (b) or (d) shall submit an antidegradation demonstration that includes the following:

(1) Basic information required under subsection (a).

(2) Necessary information required under subsection (c).

(3) Alternatives analysis information required under subsection (e).

(4) Social and economic analysis information required under subsection (g).

(g) For each regulated pollutant in the proposed new or increased discharge associated with activities in subsection (f), each antidegradation demonstration shall include the following social and economic analysis information:

(1) The anticipated impact on aquatic life and wildlife, considering the following:

(A) Threatened and endangered species.

(B) Important commercial or recreational sport fish species.

(C) Other individual species.

(D) The overall aquatic community structure and function.

(2) The anticipated impact on human health.

(3) The degree to which water quality may be lowered in waters located within the following:

(A) National, state, or local parks.

(B) Preserves or wildlife areas.

(C) OSRWs or ONRWs.

(4) The extent to which the resources or characteristics adversely impacted by the lowered water quality are unique or rare within the locality or state.

(5) Where relevant, the anticipated impact on economic and social factors, including the following:

(A) Creation, expansion, or maintenance of employment.

(B) The unemployment rate.

(C) The median household income.
(D) The number of households below the poverty level.
(E) Community housing needs.
(F) Change in population.
(G) The impact on the community tax base.
(H) Provision of fire departments, schools, infrastructure, and other necessary public services.
(I) Correction of a public health, safety, or environmental problem.
(J) Production of goods and services that protect, enhance, or improve the overall quality of life and related research and development.
(K) The impact on the quality of life for residents in the area.
(L) The impact on the fishing, recreation, and tourism industries.
(M) The impact on threatened and endangered species.
(N) The impact on economic competitiveness.
(O) Demonstration by the applicant that the factors identified and reviewed under clauses (A) through (N) are necessary to accommodate important social or economic development despite the proposed significant lowering of water quality.
(P) Inclusion by the applicant of additional factors that may enhance the social or economic importance associated with the proposed discharge, such as an approval that recognizes social or economic importance and is given to the applicant by:
(i) a legislative body; or
(ii) other government officials.

(6) Any other:
(A) action or recommendation relevant to the antidegradation demonstration:
(i) made by a:
(AA) state;
(BB) county;
(CC) township; or
(DD) municipality;
potentially affected by the proposed discharge; or
(ii) received during the public participation process; and
(B) factors that the commissioner:
(i) finds relevant; or
(ii) is required to consider under the CWA.

(Water Pollution Control Board; 327 IAC 2-1.3-5)

327 IAC 2-1.3-6 Commissioner's determination on antidegradation demonstration
Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18
Affected: IC 13-18-3-14; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 6. (a) In determining whether a proposed discharge is necessary and provides important economic or social development in the area in which the waters are located under antidegradation standards and implementation procedures, the commissioner:
(1) must give substantial weight to any applicable determinations by governmental entities; and
(2) may rely on consideration of any one (1) or a combination of the factors

listed in section 5(g)(5) of this rule.

(b) Upon receipt of an antidegradation demonstration, the commissioner shall provide notice and request comment according to 327 IAC 5-2-11.2. The commissioner shall hold a public meeting on the antidegradation demonstration in accordance with 327 IAC 5-2-11.2 if:

(1) the proposed discharge is to an OSRW; or

(2) a public meeting is requested by at least twenty-five (25) persons living or working within:

(A) the same ten (10) digit watershed; or

(B) fifteen (15) miles of the proposed discharge.

The commissioner may hold a public meeting in accordance 327 IAC 5-2-11.2 if the commissioner otherwise deems such a meeting appropriate.

(c) The commissioner shall make a determination on the antidegradation demonstration by considering the following:

(1) Whether the demonstration meets the following:

(A) Is administratively complete.

(B) Provides the following information:

(i) The applicable factors listed in section 5 of this rule, as appropriate, for the new or increased discharge.

(ii) Any other information that the commissioner deems appropriate regarding the:

(AA) proposed activities; and

(BB) affected receiving water or waters.

(2) Information regarding a public meeting to discuss the antidegradation demonstration with citizens in the area where the activities are proposed to occur, including one (1) of the following:

(A) Evidence that the applicant held a public meeting that allowed interested parties the opportunity to hear the applicant's rationale supporting the elements of the applicant's antidegradation demonstration.

(B) Indication from the applicant that it does not intend to hold a public meeting but submits its antidegradation demonstration to the department with the knowledge that:

(i) the department will hold a public meeting to present the elements of the antidegradation demonstration; and

(ii) the applicant will not be afforded the opportunity to present its rationale supporting the elements of its antidegradation demonstration.

(d) The commissioner shall deny some or all of the request to significantly lower water quality if one (1) or more of the following applies:

(1) The action that would cause the lowering of water quality is not necessary because cost-effective measures that would prevent or minimize the proposed lowering of water quality are reasonably available but the discharger has chosen not to implement these measures.

(2) The action that would cause the lowering of water quality does not provide important economic or social development in the area.

(3) The action that would cause the lowering of water quality would jeopardize state listed endangered or federally listed threatened and endangered species.

(e) The commissioner may approve some or all of the request to significantly lower water quality only if the following have occurred:

(1) A public participation process.

(2) Appropriate intergovernmental coordination.

(3) A determination by the commissioner that the lower water quality is necessary and provides important social or economic development in the area in which the receiving water or waters is located.

(f) In no event may a permit be granted that would not meet the requirements of section 3 of this rule.

(g) When the commissioner makes a determination on an antidegradation demonstration, the commissioner shall public notice the antidegradation demonstration determination according to 327 IAC 5-2-11.2 and the final determination shall:

(1) summarize, in the public notice form, the determining factors relied upon by the commissioner; and

(2) if approved for an NPDES permit, be incorporated into the:

(A) draft permit; and

(B) fact sheet;

that are made available for public comment under 327 IAC 5-3-9.

(Water Pollution Control Board; 327 IAC 2-1.3-6)

327 IAC 2-1.3-7 Water quality improvement project or payment to the OSRW improvement fund

Authority: IC 13-13-5-1; IC 13-13-5-2; IC 13-18

Affected: IC 13-18-3-14; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 7. (a) A discharger proposing to cause a significant lowering of water quality in an OSRW shall:

(1) implement a water quality improvement project in the watershed of the affected OSRW; or

(2) fund a water quality improvement project in the watershed of the affected OSRW by payment of a fee into the OSRW improvement fund established under IC 13-18-3-14;

for each activity undertaken that will result in a significant lowering of water quality in an OSRW.

(b) To implement a water quality improvement project in the watershed of the affected OSRW, the following apply:

(1) A discharger proposing to implement a water quality improvement project in the watershed of the OSRW that will result in an overall improvement of the water quality of the OSRW shall submit information on the proposed water quality improvement project to the commissioner simultaneously with the submission of the antidegradation demonstration required under section 5 of this rule. The water quality improvement project information must include the following:

(A) A detailed description of the project, including:

(i) the type and quantity of pollutants that will be reduced or eliminated as a result of the project; and

(ii) a project implementation timeline.

(B) Sufficient information to clearly demonstrate that the project will result in an overall improvement in water quality in the OSRW.

(C) Any data used to assess overall water quality improvement must be less than seven (7) years old and specific to the OSRW.

(2) Upon receipt of the water quality improvement project information, the commissioner shall do the following:

(A) Provide notice and request comment according to 327 IAC 5-2-11.2(b).

(B) Hold a public meeting in accordance with 327 IAC 5-2-11.2(b)(3) on the water quality improvement project information concurrently with the public meeting held on the antidegradation demonstration.

(3) Once the commissioner determines that the information provided by the discharger submitting the proposed water quality improvement project is administratively complete, the commissioner shall make a determination as to whether the project, based on the information submitted by the applicant, will result in an overall improvement in water quality in the OSRW.

(4) The commissioner shall approve or deny a water quality improvement project considering the following factors:

(A) Whether the project can be successfully implemented.

(B) Whether the project will offset the lowering of water quality caused by new or increased loadings of regulated pollutants.

(c) To fund a water quality improvement project in the watershed of the affected OSRW by payment of a fee into the OSRW improvement fund established under IC 13-18-3-14, the following apply:

(1) A discharger proposing to fund a water quality improvement project in the watershed of the affected OSRW by payment of a fee into the OSRW improvement fund established under IC 13-18-3-14 prior to issuance of a permit, shall pay an amount that:

(A) shall not exceed five hundred thousand dollars ($500,000); and

(B) is determined by the department:

(i) using the water quality improvement project information required under subsection (b)(1) as submitted to the department by the discharger; and

(ii) based on the:

(AA) type and quantity of increased pollutant loadings;

(BB) estimated initial capital cost; and

(CC) costs of operation and maintenance;

for the treatment system or other alternative that would be necessary to offset the proposed significant lowering of water quality caused by the increased pollutant loadings to the OSRW or its tributaries.

(2) The commissioner, prior to utilizing the funds in the OSRW improvement fund, shall solicit input from interested parties on the identification and selection of the water quality improvement projects to be funded with the funds in the OSRW improvement fund.

(3) The commissioner shall utilize the funds in the OSRW improvement fund to implement water quality improvement projects considering the following factors:

(A) Whether the project can be successfully implemented.

(B) Whether the project will offset the lowering of water quality caused by new or increased loadings of a regulated pollutant.

(C) Cost-effectiveness of the project.

(Water Pollution Control Board; 327 IAC 2-1.3-7)

SECTION 2. 327 IAC 2-1.5-6 IS AMENDED TO READ AS FOLLOWS:

327 IAC 2-1.5-6 Bioaccumulative chemicals of concern

Authority: IC 13-14-8; IC 13-14-9; IC 13-18-3

Affected: IC 13-18-4; IC 13-30-2-1

Sec. 6. (a) A bioaccumulative chemical of concern (BCC) is any chemical that meets the following requirements:

(1) Has the potential to cause adverse effects.

(2) Has a half-life of at least eight (8) weeks in the water column, sediment, and biota.

(3) Upon entering the surface waters, by itself or as its toxic transformation product, accumulates in aquatic organisms by a human health bioaccumulation factor (BAF) greater than one thousand (1,000) after considering metabolism and other physicochemical properties that might enhance or inhibit bioaccumulation, in accordance with the procedure in section 13 of this rule. The minimum BAF information needed to define a chemical as a BCC is either of the following:

(A) For an organic chemical, either a field-measured BAF or a BAF derived using the BSAF methodology.

(B) For an inorganic chemical, including an organometal, either a field-measured BAF or a laboratory-measured BCF.

(b) Pollutants that are BCCs include, but are not limited to, the following:

Table 6-1

Bioaccumulative Chemicals of Concern

CAS Number	Substance
57749	Chlordane
72548	4,4'-DDD; p,p'-DDD; 4,4'-TDE; p,p'-TDE
72559	4,4'-DDE; p,p'-DDE
50293	4,4'-DDT; p,p'-DDT
60571	Dieldrin
118741	Hexachlorobenzene
87683	Hexachlorobutadiene; hexachloro-1,3-butadiene
608731	Hexachlorocyclohexanes; BHCs
319846	alpha-Hexachlorocyclohexane; alpha-BHC
319857	beta-Hexachlorocyclohexane; beta-BHC
319868	delta-Hexachlorocyclohexane; delta-BHC
58899	Lindane; gamma-Hexachlorocyclohexane; gamma-BHC
7439976	Mercury
2385855	Mirex
29082744	Octachlorostyrene
1336363	PCBs; polychlorinated biphenyls
608935	Pentachlorobenzene
39801144	Photomirex
1746016	2,3,7,8-TCDD; dioxin

634662	1,2,3,4-Tetrachlorobenzene
95943	1,2,4,5-Tetrachlorobenzene
8001352	Toxaphene

(c) The substances established in this subsection shall be treated as BCCs under this rule, **327 IAC 2-1.3,** and ~~under 327 IAC 5-2-11.3~~ **327 IAC 5-2-11.4** through 327 IAC 5-2-11.6. If additional data becomes available (such as a field-measured BAF) for a substance established in this subsection that conclusively demonstrates that the substance should not be treated as a BCC, the commissioner may determine that it is not necessary to treat the substance as a BCC. Substances treated as BCCs include the following:

Table 6-2
Substances Treated as Bioaccumulative Chemicals of Concern

CAS Number	Substance
309002	Aldrin
72208	Endrin
76448	Heptachlor

(Water Pollution Control Board; 327 IAC 2-1.5-6; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1370; errata filed Aug 11, 1997, 4:15 p.m.: 20 IR 3376; filed Feb 14, 2005, 10:05 a.m.: 28 IR 2074)

SECTION 3. 327 IAC 2-1.5-18 IS AMENDED TO READ AS FOLLOWS:

327 IAC 2-1.5-18 Designation of a waterbody as a limited use water or an outstanding state resource water

Authority: IC 13-14-8; IC 13-14-9; IC 13-18-3
Affected: IC 13-18-4

Sec. 18. (a) Except as provided in subsection (f), a person who wishes to propose that a waterbody within the Great Lakes system be considered by the commissioner for designation as a limited use or outstanding state resource water shall submit to the commissioner a written proposal:

(1) identifying the waterbody and the proposed designation stating the rationale for the proposal; and
(2) including any other supporting documentation.

(b) The commissioner shall evaluate the proposal considering the following:
(1) Waters that meet the following conditions may be considered for designation as a limited use water:
(A) Waters that have:
(i) naturally poor physical characteristics (that is, suitable habitat to support a well-balanced fish community is severely limited or absent) including lack of sufficient flow ($Q_{7,10}$ low flow upstream of any existing or proposed discharge of one-tenth (0.1) cubic foot per second or less);
(ii) naturally poor chemical quality;
(iii) irreversible man-induced conditions that came into existence before January 1, 1983; and
(iv) no unique or exceptional features.
(B) No potential or existing uses made of the waterbody by people in the

immediate area would be adversely affected by a limited use designation.

(C) The waterbody has been evaluated by a use attainability analysis.

(2) Factors that relate to outstanding state resource water designations may include, but are not limited to, the following:

(A) The presence of any of the following:

(i) A unique or exceptional habitat or species in the waterbody.

(ii) A rare or endangered species in the waterbody.

(iii) Exceptional aesthetic quality in the immediate environs of the waterbody.

(B) The waterbody:

(i) is within the boundaries of or flows through a designated natural area, nature preserve, or state or national park or forest;

(ii) supports an excellent sports fishery; or

(iii) possesses exceptional quality.

(C) Intensive recreational use is made of the waterbody.

(D) Designation as a natural, scenic, or recreational waterbody by the Indiana department of natural resources.

Irrespective of these factors, the commissioner's evaluation will generally be a case-by-case determination using information obtained from an on-site evaluation. If appropriate, the commissioner shall consult with the Indiana department of natural resources concerning the designation of a waterbody as an outstanding state resource water.

(c) After completion of the evaluation under subsection (b), if the commissioner determines that reclassification of the waterbody is appropriate, the commissioner shall initiate a rulemaking to include the waterbody either as a limited use water or an outstanding state resource water under section 19 of this rule.

(d) All waters that are designated as a limited use water under section 19(a) of this rule must be evaluated for restoration and upgrading at each triennial review of this rule.

(e) The department shall initiate a special designations rulemaking in accordance with the following:

(1) The special designations rulemaking shall be initiated for the following purposes:

(A) Determining the following:

(i) Whether any other designations in addition to:

(AA) outstanding state resource waters;

(BB) high quality waters;

(CC) limited use waters; and

(DD) outstanding national resource waters;

should be established.

(ii) The appropriate factors to consider in designating a waterbody.

(B) Identifying a list of waterbodies for each special designation.

(C) Specifying antidegradation implementation procedures for ~~the following:~~

~~(i) Outstanding state resource waters.~~

~~(ii) Outstanding national resource waters.~~

~~(iii)~~ any other newly established designation **that is in addition to those specified at 327 IAC 2-1.3.**

(2) Before the presentation of proposed rules on special designations to the board, the department shall consult with:

(A) other state and federal agencies; and
(B) interested persons within Indiana;
as appropriate. The department shall provide information to the public on the history, intent, and importance of the current outstanding state resource water designation and the list of outstanding state resource waters.
(3) The department shall seek comment, as part of the second notice on special designations, on the following:
(A) Adding waterbodies to the list of outstanding national resource waters.
(B) The specific ~~interim~~ antidegradation implementation procedures included in ~~327 IAC 5-2-11.7~~ **327 IAC 2-1.3-3** for outstanding state resource waters.
(C) Procedures for addressing increases not included in the specific exceptions listed in ~~327 IAC 5-2-11.7(c)(2).~~ **327 IAC 2-1.3-4.**
(4) The following statement shall be included in the second notice and shall be used as a guide during the special designation rulemaking, "The ~~interim~~ antidegradation implementation procedures for outstanding state resource waters in ~~327 IAC 5-2-11.7~~ **327 IAC 2-1.3-3** are intended only to assure that a specific process exists to address proposed changes pending the completion of the special designation rulemaking. The board does not consider the specific procedures listed in ~~327 IAC 5-2-11.7~~ **327 IAC 2-1.3-3** as a final policy statement or as binding on the board in the special designation rulemaking.".
~~(5) The department shall present rules to the board on a schedule such that final rules may be adopted and made effective before the expiration of 327 IAC 5-2-11.7.~~

(f) A person seeking to obtain a CSO wet weather limited use subcategory designation shall do so in accordance with 327 IAC 2-1-3.1. *(Water Pollution Control Board; 327 IAC 2-1.5-18; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1410; errata filed Aug 11, 1997, 4:15 p.m.: 20 IR 3378; filed Sep 6, 2007, 12:25 p.m.: 20071003-IR-327050218FRA)*

SECTION 4. 327 IAC 5-2-11.2 IS AMENDED TO READ AS FOLLOWS:

327 IAC 5-2-11.2 Public notice of comment period and public meetings for site-specific modification of water quality criteria and values; an antidegradation demonstration; a water quality improvement project; an alternate mixing zone demonstration; a variance
Authority: IC 13-14-8; IC 13-14-9; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-3
Affected: IC 13-11-2; IC 13-15-4-1; IC 13-15-5-1; IC 13-18-4; IC 13-18-7; IC 13-23-13; IC 13-24-1; IC 13-25-5

Sec. 11.2. (a) This section is applicable to ~~an application for~~ the following:
(1) Site-specific modification to water quality criteria under 327 IAC 2-1-8.9 and Tier I water quality criteria and Tier II water quality values under 327 IAC 2-1.5-16.
(2) An antidegradation demonstration under ~~section 11.3(b)(4) of this rule.~~ **327 IAC 2-1.3-5.**
(3) ~~An antidegradation exception~~ **A water quality improvement project** under ~~section 11.7(c) of this rule.~~ **327 IAC 2-1.3-7.**
(4) An alternate mixing zone under section 11.4(b)(4)(F) of this rule.
(5) A variance under 327 IAC 5-3-4.1(c).

(b) Upon receipt of ~~an application~~ **the information for a proposal** listed in subsection (a), the commissioner shall provide notice, request comment, and, if requested, schedule and hold a public meeting on ~~the application~~ in accordance with the following conditions:

(1) The commissioner shall provide notice of receipt of ~~an application~~ **information related to subsection (a)** in the following manner:

(A) Publication of a notice in a daily or weekly newspaper in general circulation throughout the area affected by the discharge for which the ~~application demonstration~~ **information** was submitted.

(B) Send the notice to **the following using electronic media whenever possible:**

(i) Interested persons on either mailing list identified under the following:

~~(i)~~ **(AA)** 327 IAC 5-3-8(a).

~~(ii)~~ **(BB)** 327 IAC 5-3-12(b)(1).

~~(C) Send the notice to~~ **(ii)** The applicant.

(2) The notice under subdivision (1) shall contain the following:

(A) The name and address of the department.

(B) The name and address of the applicant.

(C) An identification of the type of ~~application~~ **information** submitted, such as **a site-specific modification, antidegradation demonstration, water quality improvement project,** alternate mixing zone, or variance.

(D) A brief description of the **following:**

(i) Location of any existing or proposed discharge point subject to the ~~application~~ **proposal listed in subsection (a),** including an identification of the receiving water **or waters.**

~~(E) A brief description of~~ **(ii)** The applicant's activities or operations that result in the discharge identified in the ~~application.~~ **information related to subsection (a).**

(iii) The comment procedures and the procedures to request a public meeting.

~~(F)~~ **(E)** An identification of the ~~substance for which the application was submitted.~~ **regulated pollutant proposed to be discharged.**

~~(G) The name of an agency~~ **(F) Information on how to** contact ~~person and an address and telephone number where~~ **the department so** interested persons may obtain further information, including a copy of the ~~application.~~ **information that was submitted related to subsection (a).**

~~(H) A brief description of the comment procedures and the procedures to request a public meeting.~~

(3) If requested **by at least twenty-five (25) persons living or working within the same ten (10) digit watershed or within fifteen (15) miles of the proposed discharge,** the commissioner shall hold a public meeting on the ~~application~~ **information that was submitted related to subsection (a)** in accordance with the following provisions:

(A) The commissioner shall provide notice of the public meeting as follows:

(i) Publication of a notice in a daily or weekly newspaper in general circulation throughout the area affected by the discharge for which the ~~application~~ **information related to subsection (a)** was submitted.

(ii) Send the notice, **using electronic media whenever possible,** to the following interested persons:

(AA) Persons on the mailing list identified under 327 IAC 5-3-8(a).

(BB) Persons on the mailing list identified under 327 IAC 5-3-12(b)(1).

(CC) Those persons that commented on the notice of receipt of the **information for the proposal related to subsection (a).**

(iii) Send the notice to the applicant.

(B) The notice required by clause (A) shall contain the **following:**

(i) The date, time, and place of the public meeting. ~~and~~

(ii) The information required under subdivision (2).

(C) The meeting shall be held at least ten (10) days after the later of the following:

(i) The notice in accordance with clause (A)(i) appears in the newspaper.

(ii) The ~~postmark~~ date of the ~~written~~ notice sent to interested parties and to the applicant in accordance with clause (A)(ii) and (A)(iii).

(D) The meeting shall be recorded by any ~~of the following:~~

~~(i) Audiotape.~~

~~(ii) Videotape.~~

~~(iii) Any other~~ method of accurately and completely recording the details of the meeting.

(E) **For the information that is listed in subsection (a), except in the case of an antidegradation demonstration that under 327 IAC 2-1.3-6(c)(2)(B)(ii) did not include evidence that the applicant held a public meeting that allowed interested parties the opportunity to hear the applicant's rationale supporting the elements of the applicant's antidegradation demonstration,** the commissioner shall request the applicant **submitting the information** to provide **at the meeting** a summary and rationale for the ~~application at the meeting.~~ **proposal described by the submitted information.**

(F) At the commissioner's discretion, a public meeting may be noticed and held without having first received a request for a public meeting. In these instances, the notice for the public meeting may be ~~contained~~ **included** in the notice of receipt of the ~~application.~~ **information for the proposal related to subsection (a).**

(4) The time period under IC 13-15-4-1 is hereby changed to increase the period by:

(A) thirty (30) days for any permit application subject to the time period that is affected by the ~~application.~~ **information for the proposal related to subsection (a); and**

(B) an additional thirty (30) days beyond the period extended under clause (A) if a public meeting is requested. ~~the time period under IC 13-15-4-1 is hereby changed to increase the period by an additional thirty (30) days.~~ **under subdivision (3).**

(Water Pollution Control Board; 327 IAC 5-2-11.2; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1435; errata filed Aug 11, 1997, 4:15p.m.: 20 IR 3378; filed Feb 14, 2005, 10:05 a.m.: 28 IR 2101)

SECTION 5. 327 IAC 5-2-12.1 IS AMENDED TO READ AS FOLLOWS:

327 IAC 5-2-12.1 Great Lakes systems dischargers; schedules of compliance

Authority: IC 13-14-8; IC 13-14-9; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-3

Affected: IC 13-11-2; IC 13-18-4

Sec. 12.1. (a) When a permit issued to a new Great Lakes discharger contains a WQBEL, the permittee shall comply with such a limitation upon the commencement of the discharge.

(b) Any existing permit that is reissued or modified to contain a new or more restrictive WQBEL or a more restrictive limit of quantitation (LOQ) (when an LOQ is used as the compliance value for a WQBEL below an LOQ) may allow a reasonable period of time, up to five (5) years from the date of permit issuance or modification, for the permittee to comply with

that limit in accordance with the following conditions:

(1) When the compliance schedule established under this subsection goes beyond the term of the permit, an interim permit limit effective upon the expiration date shall be included in the permit and addressed in the permit's fact sheet or statement of basis. The permit shall reflect the final limit and its compliance date.

(2) If a permit establishes a schedule of compliance under this subsection, which exceeds one (1) year from the date of permit issuance or modification, the schedule shall set forth interim requirements and dates for their achievement as follows:

(A) The time between such interim dates may not exceed one (1) year.

(B) If the time necessary for completion of any interim requirement is more than one (1) year and is not readily divisible into stages for completion, the permit shall require, at a minimum, specified dates for annual submission of progress reports on the status of any interim requirements.

(c) Whenever a limit based upon a Tier II value is included in a reissued or modified permit for an existing Great Lakes discharger, the permit may provide a reasonable period of time, up to two (2) years, in which to provide additional studies necessary to develop a Tier I criterion or to modify the Tier II value. In such cases, the permit shall require compliance with the Tier II limitation within a reasonable period of time, no later than five (5) years after permit issuance or modification, and contain a reopener clause in accordance with the following conditions:

(1) The reopener clause shall authorize permit modifications if specified studies have been completed by the permittee or provided by a third party during the time allowed to conduct the specified studies, and the permittee or a third party demonstrates, through such studies, that a revised limit is appropriate. Such a revised limit shall be incorporated through a permit modification and a reasonable time period, up to five (5) years, shall be allowed for compliance. If incorporated prior to the compliance date of the original Tier II limitation, any such revised limit shall not be considered less stringent for purposes of the antibacksliding provisions of section 10(11) of this rule and Section 402(o) of the Clean Water Act (CWA).

(2) If the specified studies have been completed and do not demonstrate that a revised limit is appropriate, the commissioner may provide a reasonable additional period of time, not to exceed five (5) years with which to achieve compliance with the original effluent limitation.

(3) Where a permit is modified to include new or more stringent limitations, on a date within five (5) years of the permit expiration date, such compliance schedules may extend beyond the term of a permit consistent with subsection (b)(1).

(4) If future studies (other than those conducted under this subsection) result in a Tier II value being changed to a less stringent Tier II value or Tier I criterion, after the effective date of a Tier II-based limit, the existing Tier II-based limit may be revised to be less stringent if:

(A) it complies with section 10(11)(B) and 10(11)(C) of this rule and Section 402(o)(2) and 402(o)(3) of the CWA;

(B) in nonattainment waters, the cumulative effect of the revised effluent limitation will assure compliance with water quality standards; or

(C) in attained waters, the revised effluent limitation complies with the antidegradation standard and procedures contained under ~~327 IAC 2-1.5-4 and section 11.3 of this rule~~. **327 IAC 2-1.3**.

(Water Pollution Control Board; 327 IAC 5-2-12.1; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1464;

errata filed Aug 11, 1997, 4:15 p.m.: 20 IR 3380)

SECTION 6. 327 IAC 5-3-8 IS AMENDED TO READ AS FOLLOWS:

327 IAC 5-3-8 Fact sheet

Authority: IC 13-14-8; IC 13-14-9; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-3
Affected: IC 13-11-2; IC 13-18-4

Sec. 8. (a) A fact sheet shall be prepared for every draft permit for a major discharger, any draft permit which incorporates a statutory variance or modification or requires explanation under subsection (b)(5), general permits, and every draft permit which the commissioner finds is the subject of widespread public interest or raises major issues. The fact sheet shall briefly set forth the major facts and the significant factual, legal, methodological, and policy questions considered in preparing the draft permit. The commissioner shall send this fact sheet to the following:

(1) The applicant.
(2) EPA Region 5.
(3) The district engineer of the Corps of Engineers.
(4) The regional director of the U.S. Fish and Wildlife Service.
(5) Other interested state and federal agencies.
(6) Any other person on request.
(7) All persons on a mailing list for receipt of fact sheets (see section 12(g) of this rule).

Any of these persons may waive their right to receive a fact sheet for any classes and categories of permits.

(b) The fact sheet shall include the following:
(1) A brief description of the type of facility or activity that is the subject of the draft permit and, where appropriate, a sketch or detailed description of the discharge described in the application.
(2) A description of the type and quantity of pollutants which are, or are proposed to be, discharged.
(3) A brief explanation of the express statutory or regulatory provisions on which permit requirements are based.
(4) Any calculations or other necessary explanation of the derivation of specific effluent limitations and conditions, including a citation to the applicable guideline or development documents or standard provisions as required under 327 IAC 5-2-10 and reasons why they are applicable or an explanation of how alternate effluent limitations were developed.
(5) When the draft permit contains any of the following conditions, an explanation of the reasons why such conditions are applicable:
(A) Technology-based limitations to control toxic pollutants under 327 IAC 5-2-10.
(B) Limitations on internal waste streams in accordance with 327 IAC 5-2-11(h).
(C) Limitations on indicator pollutants under 327 IAC 5-2-10(6) and 327 IAC 5-5-2(f).
(D) Limitations allowing an increase in the discharge of any pollutant, including an explanation that satisfies the requirements of 327 IAC 5-2-10(11) and the antidegradation requirements of 327 IAC 2-1, **327 IAC 2-1.3, and** 327 IAC 2-1.5. ~~and 327 IAC 5-2-11.3.~~

(E) Limitations implementing a variance from water quality standards under 327 IAC 2-1-8.8 or 327 IAC 2-1.5-17 and section 4.1 of this rule.

(6) Reasons why requested variances or modifications from otherwise required effluent limitations do or do not appear justified.

(7) Name and telephone number of a departmental contact person who can provide additional information.

(8) Any information, not otherwise specified herein, required under section 12 or 12.1 *[sic.]* of this rule.

(Water Pollution Control Board; 327 IAC 5-3-8; filed Sep 24, 1987, 3:00 p.m.: 11 IR 638; filed Feb 26, 1993, 5:00 p.m.: 16 IR 1761; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1472; readopted filed Jan 10, 2001, 3:23 p.m.: 24 IR 1518; readopted filed Nov 21, 2007, 1:16 p.m.: 20071219-IR-327070553BFA)

SECTION 7. 327 IAC 15-2-6 IS AMENDED TO READ AS FOLLOWS:

327 IAC 15-2-6 Exclusions

Authority: IC 13-14-8; IC 13-14-9; IC 13-15-1-2; IC 13-15-2-1; IC 13-18-3

Affected: IC 13-11-2; IC 13-18-4

Sec. 6. (a) Except as provided in subsection (b), an individual NPDES permit issued under 327 IAC 5 is required for a discharge to a receiving stream identified as an outstanding state resource water, an exceptional use water, or an outstanding national resource water as defined under 327 IAC 2-1-2(3), 327 IAC 2-1-11(b), or ~~327 IAC 2-1.5-4~~ **327 IAC 2-1.3-2** or which would significantly lower the water quality as defined under ~~327 IAC 5-2-11.3(b)(1)~~ **327 IAC 2-1.3-2(50)** of such a water downstream of the point source discharge.

(b) A discharge to an outstanding national resource water, outstanding state resource water, or exceptional use water may be permitted under 327 IAC 15-5, 327 IAC 15-6, or 327 IAC 15-13 if the commissioner determines the discharge will not significantly lower the water quality as defined under ~~327 IAC 5-2-11.3(b)(1)~~ **327 IAC 2-1.3-2(50)** of such a water downstream of that point source discharge. *(Water Pollution Control Board; 327 IAC 15-2-6; filed Aug 31, 1992, 5:00 p.m.: 16 IR 17; filed Jan 14, 1997, 12:00 p.m.: 20 IR 1476; filed Oct 27, 2003, 10:15 a.m.: 27 IR 830)*

SECTION 8. THE FOLLOWING ARE REPEALED: 327 IAC 2-1.5-4; 327 IAC 5-2-11.3; 327 IAC 5-2-11.7.

Fiscal Impact Analysis on State and Local Government
(Fiscal Management Circular #2010-4)

1. Calculate the estimated fiscal impact on state and local government:

Based upon 2009 application data, up to four new permits and fourteen modified permits might have been subject to the antidegradation rule. Assuming an average cost of $100 per hour for consulting fees, ten of these permits may have required a full application at an estimated cost of $16,000 each for a total of $160,000 and the other 8 would require no more than a simple application estimated to cost $4,000 for a total of $32,000. Thus the total estimated cost to state and local government is $192,000.

IDEM anticipates adding no new Office of Water Quality permit writing staff to handle antidegradation reviews as part of the normal permit review process.

2. What is the anticipated effective date of the rule?

The rule is scheduled for preliminary adoption at the July 13, 2011 Water Pollution Control Board Meeting. There will then be a third public notice and depending upon the comments received, may be scheduled for final adoption in September 2011. In that case the final rule would likely be effective in January 2012 (30 days after it is filed by the Publisher of the Indiana Register).

3. Identify any sources of revenue affected by the rule, the estimated increase or decrease in revenues or expenditures of state and local government that would result from the implementation of the rule, including the costs necessary to enforce the rule, and the related citation to the rule provision(s):

The only change to sources of revenue or expenditures for the state due to this rule are related to the OSRW improvement fund established under IC 13-18-3-14 and implemented by the rule. This is a voluntary payment of up to $500,000 by an applicant choosing not to complete a water quality improvement to offset the impact of its proposed discharge in an Outstanding State Resource Water, and can be avoided by an applicant that chooses to do the project. All of the monies received under this provision are required to be spent by the State on water quality improvement projects. For municipal governments required to prepare an antidegradation demonstration under this rule, any expenditure increase would be the cost of preparing the demonstration (estimated to be between $4,000 and $16,000), however, most municipal projects that involve a new or increased loading of a regulated pollutant would fall under an exemption in section 4 of the rule and would, therefore, incur no additional cost. This rule places no enforcement responsibilities on municipalities. As regards state enforcement of this rule, IDEM will continue enforcement, actually working with applicants to submit complete NPDES permit applications with complete antidegradation demonstration information as required by the rule. Existing staff will handle the work.

4. Identify any appropriation, distribution, or other expenditures of revenue affected by the rule and the related citations to the rule provision(s):

The only expenditure of revenue due to this rule would occur if a discharger proposing to cause a significant lowering of water quality due to a new or increased discharge to an OSRW would choose to fund the water quality improvement project required under 327 IAC 2-1.3-7(a)(2) rather than implement the required project under 327IAC 2-1.3-7(a)(1). Distribution of funds in the OSRW improvement fund established under IC 13-18-3-14 shall occur according to 327 IAC 2-1.3-7(2)(C) after the commissioner has solicited input, according to 327 IAC 2-1.3-7(c)(3)(B), from interested parties on the identification and selection of the water quality improvement projects to be funded with the funds in the OSRW improvement fund. It is possible that there may never be funds in the OSRW improvement fund if there are no dischargers causing significant lowering of water quality in an OSRW or if such dischargers opt to implement the required water quality improvement projects themselves.

5. Identify the administrative impact to state and local governments, and the related citations to the rule provision(s):

IDEM's existing administrative staff will implement this rule. Other state agencies and local governments that propose new or increased discharges of regulated pollutants could be required to prepare an antidegradation demonstration. These entities should have the existing administrative staff necessary to perform the administrative work involved, which is not much more than submitting permit paperwork to IDEM such as any NPDES permit discharger or applicant would otherwise be doing regardless of this rule. The work of conducting an antidegradation demonstration is not considered administrative and is discussed under fiscal impact analysis on state and local government.

6. Determine the extent to which the proposed rule creates an unfunded mandate on a state agency or political subdivision:

The federal mandate requiring states to have a water quality antidegradation rule is funded in part by the federal government's funding to the states for the NPDES permit and other water quality programs.

7. Is the proposed rule readopting an expiring rule? If so, include the fiscal analysis relied upon at the time of its last adoption as well as a current review of the accuracy of that analysis:

The proposed rule is not readopting an expiring rule.

Cost-Benefit Analysis

A. Statement of Need

1. An explanation as to whether the rule is intended 1) to address a federal or state statutory requirement; 2) to address an alleged market failure; and/or 3) to serve a public need, such as improving government processes or promoting public safety or health:

The rule is intended to address federal and state statutory requirements. The Clean Water Act (CWA) at 33 U.S.C. 1313(c)) and federal rules (at 40 C.F.R. 131.12) require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. Additional requirements affecting antidegradation rules come from the Indiana General Assembly's requirements found in IC 13-18-3 enacted in the 2000 legislative session under Public Law 140-2000 (also known as SEA 431). The General Assembly adopted additional antidegradation requirements, in the 2009 regular session with the passage of Public Law 78-2009, which are made part of the draft rule.

The rule will also serve a public need as the proposed rule will enhance and protect public health and the environment by protecting the state's surface waters.

The rule is also, in part, a response to the Barnes Report. Issued in December, 2007, the report recommended revising Indiana's antidegradation rules. Indiana Gov. Mitch Daniels commissioned the report by Indiana University professor Jim Barnes.

Another force behind the rulemaking is a December 17, 2009 petition to the U.S. EPA by the Environmental Law and Policy Center, the Hoosier Chapter of the Sierra Club and the Hoosier Environmental Council asking that U.S. EPA withdraw Indiana's Clean Water Act Authority due to, among other issues, Indiana's lack of appropriate antidegradation implementation regulations.

2. An estimate of the number of individuals and businesses affected by the rule:

Based on 2009 National Pollution Discharge Elimination System (NPDES) permit submissions, up to 50 businesses and 30 municipalities may be required determine if they need to perform an antidegradation demonstration each year.

3. An evaluation of the policy rationale or goal behind the proposed rule, including an analysis of the following:

A. Identify the conduct and its frequency of occurrence that the rule is designed to change or address:

The purpose of the antidegradation process is to preserve the existing quality of water that is cleaner than minimum standards. It does this by requiring an evaluation of alternatives before permitting new pollutant discharges above a de minimis level. If the new discharge will degrade the existing water quality, the State needs to find that the social and economic benefits of the water degradation exceed the social and economic benefits of preserving the existing water quality.

Based upon 2009 permit applications, there are about 80 permit applications a year that may result in a new discharge of pollutants.

B. Discuss the harm resulting from the conduct that the rule is designed to change and the likelihood the conduct will continue to occur absent a rule change:

Without the proposed rule, there is not a clear path to satisfy the federal and state statutory antidegradation requirements. This means that U.S. EPA and environmental groups may legally challenge the permits issued by IDEM, resulting in uncertainty for regulated entities. The proposed rule will allow IDEM and the regulated community to clearly demonstrate that proposed discharges of regulated pollutants to surface waters of the state that are cleaner than the minimum standard will either maintain water quality in the current condition, or that the social and economic benefit of the project outweigh maintaining the current water quality.

C. How has the agency involved regulated entities in rule development?

An extensive public participation process was initiated in early 2008 and included representatives of the regulated community (industrial and municipal wastewater dischargers), environmental community, U.S. EPA and the Indiana Department of Environmental Management (IDEM). A large workgroup inclusive of all interested parties convened on April 29, 2008, to discuss the broad issues involved in this rulemaking. A second large workgroup meeting was held on June 25, 2008, and, at that meeting, the workgroup decided to select a smaller subgroup with chosen representatives from each of the interested sectors (environmental, municipal, and industrial communities) who would continue the rule development process with IDEM. The subgroup held meetings on nearly a monthly schedule from July 2008 through January 2009 and concluded with a final meeting on April 22, 2009. After the final subgroup meeting, IDEM took the collected information and finalized the developing draft rule, which was presented to the large workgroup in an open meeting held on August 4, 2009. For complete information on the workgroup and subgroup activities, please go to: http://www.in.gov/idem/5387.htm

4. Provide a detailed description of the methodology used in making the above determinations.

Most of the above determinations were made simply by following the requirements of the federal Clean Water Act (CWA) and Indiana statutes. The CWA itself provides a description of the policy and rationale behind the antidegradation rule, and Indiana statutes provide the required framework for public notice of and involvement in the rulemaking.

B. Evaluation of Costs and Benefits

Provide a comprehensive enumeration of the costs and benefits of the rule, including tangible and intangible costs and benefits. If costs and benefits cannot be monetized or quantified, explain why and include a thorough description of the non-quantifiable costs and benefits as well as a determination whether such costs and benefits will be significant. The cost-benefit analysis should conclude with the agency's determination whether the benefits are likely to exceed the costs. In reaching that determination, include the following factors or an explanation of why each factor is not applicable:

1. An estimate of the primary and direct benefits of the rule, including the impact on consumer protection, worker safety, the environment, and business competitiveness;

There are three main benefits of the proposed rule: regulatory certainty, preservation of the capacity of waters to accept new discharges of pollutants from future economic development projects or population growth, and the health and environmental benefits of preserving existing water quality.

Environmental protection, specifically water quality protection, is the direct and primary benefit of this rule. The reason to protect the environment is for the protection of human health, which is both a direct and indirect benefit of this rule.

2. An estimate of the secondary or indirect benefits of the rule and an explanation of how the conduct regulated by the rule is linked to the primary and secondary benefits;

Secondary or indirect benefits of the rule include protection of human health, consumer protection (from higher costs of drinking water treatment and water borne disease or infection), and worker safety for those working in or around waters of the state, protection of aquatic life and the recreational use of Indiana's surface waters.

3. An estimate of the compliance costs for regulated entities, including fees, new equipment or supplies, increased labor and training, education, supervisory costs, and any other compliance cost imposed by the requirements of the rule;

Based upon the 80 permit applications received in 2009 that might be required to consider antidegradation, a consulting cost of $100 per hour, and our estimate that a complex antidegradation process would require 160 professional hours, the annual cost to the regulated community to implement the rule would be up to $1,280,000. If the cost of professional services was $300 per hour, this estimate would increase to $3,840,000 per year.

The Indiana Manufacturers Association has submitted public comments estimating the total annual cost to be between $3,034,200 and $9,920,000. They did not provide the estimated number of professional hours or the cost per hour behind their estimates. Major differences between the IMA estimate and IDEM's estimate is that the IMA assumes that each request to change a water treatment additive at a facility (estimated at 108 requests per year) would require full antidegradation review at an annual cost of between $1,425,600 and $4,050,000. They also assume that up to 105 permits a year will require review versus the 80 assumed by IDEM—this increases their estimate by about 30%. Finally, they assume that the public notice process will cost between $720,000 and $945,000 per year—this is far in excess of IDEM's experience and the proposed rule makes the public notice process optional for the applicant (if they do not choose to engage in the process, IDEM will do it).

4. An estimate of the administrative expenses, including legal, consulting, reporting, accounting or other administrative expenses imposed by the requirements of the rule;

These costs are included in the estimates responding to item 3. Administrative expenses related to this rule are considered to be the cost to submit an antidegradation demonstration to IDEM and would be similar to the cost and process to submit an NPDES application and occur in combination with the NPDES permit application, an activity required of a discharger proposing a new or increased discharge, even in the absence of an antidegradation rule. The possible cost for preparing an antidegradation demonstration, including consultant services if utilized, is not considered to be administrative but is the cost of complying with the rule.

5. An estimate of any cost savings to regulated entities as a result of the proposed rule. State whether savings are from a change in an existing requirement or the imposition of a new requirement.

It is unlikely that this rule will result in cost savings to regulated entities.

On March 10, 2010, the Environmental Law & Policy Center, in response to IDEM's request for information from interested parties regarding the fiscal impacts of IDEM's draft antidegradation implementation rules, submitted their estimates for economic benefits of the rule. This document estimates the economic benefits to Indiana from anglers, hunters and wildlife watchers at greater than $2 billion per year.

The incremental water quality values addressed by the proposed antidegradation rule and the 80 applications a year that may be subject to this rule would not be expected to significantly impact existing fishing, hunting or wildlife watching in Indiana.

C. Examination of Alternatives

Include an evaluation of alternatives to achieve the objectives of the proposed rule or amendment.

1. Alternatives considered in the rulemaking workgroup process

a. Applicability: Section 1 of the Antidegradation Standards and Implementation Procedures rule explains the applicability of the rule. The antidegradation standards established by the rule apply to all surface waters of the state, and the antidegradation implementation procedures established by the rule apply to a proposed new or increased loading of a regulated pollutant to a surface water of the state that will result from a deliberate action including a change in process or operation that adds additional regulated pollutants or creates an increase in loading of a regulated pollutant already being discharged.

The entire first meeting of the antidegradation subgroup (a group of stakeholders selected by the larger antidegradation stakeholder workgroup) was spent discussing the issue of applicability. During this discussion, the option of requiring antidegradation review only when a new NPDES permit is required was considered—further analysis determined that such a restriction would not meet the requirements of the Clean Water Act.

b. De minimis: The concept of de minimis is that there is some small amount of added pollutant load that is considered too small to need an antidegradation demonstration to prove it meets the

necessary test of social and economic benefit. EPA accepts the application of a de minimis if properly defined and implemented, and the proposed rule incorporates this concept.

c. Unused/available loading capacity, and how much of it shall be required to remain after inclusion of a new or increased loading of a regulated pollutant. Alternatives discussed included whether the calculation of a water body's unused/available loading capacity would be a cumulative calculation from the time of the first additional loading of a regulated pollutant after the effective date of the rule, or start anew with each additional loading. Based upon recent federal court decisions, consideration of cumulative loading is included in the proposed rule.

d. Pollutants of concern or regulated pollutants, to include only those with numeric criterion or others with narrative standards. Based upon public comments received, the rule applies only to regulated pollutants.

e. Exemptions and how much information is to be required in the antidegradation demonstration to justify the discharger being eligible for a stated exemption. Based upon U.S. EPA objections to the concept of "exemptions," we have reworked the proposed rule so that certain activities are "deemed to meet" some or all of the antidegradation requirements.

2. Alternatives defined by statute. Is the rule consistent with the specific statutory requirement and clearly within the agency's statutory discretion?

Yes. The CWA requires states to adopt antidegradation standards and implementation procedures, but leaves the specifics up to the states. This rule is Indiana's specific measure to meet those federal requirements statewide. IC 13-18-3-2 requires that Indiana's antidegradation rule to include a de minimis and to allow a discharger to choose either to conduct a water quality improvement project, or to deposit funds, not to exceed $500,000, as compensation for new or increased discharges into an Outstanding State Resource Water (OSRW) that are determined to be socially or economically beneficial in the area of the discharge.

3. The feasibility of market-oriented approaches, including a determination whether the market could eventually remedy the alleged harm the rule is intended to regulate, rather than direct controls;

The regulation does allow people to avoid the regulation by choosing not to increase the discharge of a regulated pollutant and, in the case of Outstanding State Resource Waters, to pay for someone else (including the State) to take actions to offset the proposed new discharge. Entirely substituting a market approach for the proposed regulation is simply not an option under federal statute and regulations. The CWA and corresponding federal regulations require Indiana to adopt antidegradation provisions that protect waters of the state that meet or exceed Indiana water quality standards. The Indiana Legislature has required the use of a partial market based approach for antidegradation by establishing IC 13-18-3-2 and IC 13-18-3-14 to create a fund where an applicant may pay a fee in lieu of completing a water quality improvement project required to mitigate new or increased discharges subject to antidegradation requirements in Outstanding State Resource Waters.

4. Measures to improve the availability of information, as an alternative to regulation;

By requiring consideration of alternatives for activities subject to the antidegradation process, the rule does encourage applicants to avoid the process. However, the Clean Water Act makes substituting information for an antidegradation regulation legally impossible.

5. If applicable, various enforcement methods, such as inspections, periodic reporting, and non-compliance penalties;

These measures are not applicable to the antidegradation rule. There is nothing to enforce, inspect, report, or assess penalties on prior to there being a determination on an antidegradation demonstration. The antidegradation rule will apply to discharges that will occur in the future.

6. Performance standards rather than design standards. Performance standards express requirements in terms of desired outcomes. Design standards express requirements in terms of the specific means that must be satisfied without choice or discretion;

Performance standards, and not design standards, are the basis of the proposed antidegradation rule. The rule is essentially a set of desired outcomes – the preservation of existing water quality. Performance standards are the core of the requirements of the antidegradation rule.

7. Different requirements for different sized regulated entities. A variation of benefits and costs may exist depending on the mix of entities being regulated;

The antidegradation rule does not contain different requirements based directly on the size of a regulated entity but rather on the size and type of proposed discharge and whether it is eligible for reduced antidegradation demonstration requirements. One of the reduced requirements is the concept of de minimis, the idea that the proposed new or increased loading of a regulated pollutant is sufficiently small to not need an antidegradation demonstration. In that regard, size (or more accurately, quantity) of the entity's proposed new or increased loading of a regulated pollutant is a differentiating factor, not the size of the regulated entity. A small sized regulated entity may be more likely to qualify for a de minimis exemption from the requirements of the rule.

8. Establish a baseline. Consider how the world would look without the proposed rule. Issues to consider when forming a baseline include evolution of the market, changes in external factors affecting expected costs and benefits, existing rules by the agency and other government entities, and the degree of compliance by regulated entities with other rules.

Without the antidegradation rule Indiana would continue to be in violation of the Clean Water Act's requirement to have antidegradation standards and implementation procedures for the entire state, and each permit that we issue will continue to be vulnerable to being overturned by the courts. There is generally no financial value to a discharger to clean up the receiving water except to meet regulatory requirements, so market forces are not likely to achieve the statutorily required preservation of our environment.

9. Different compliance dates;

The antidegradation rule does not contain specific compliance dates because the rule will apply to a regulated entity only when the entity proposes a new or increased discharge that is subject to the rule.

10. Redundancy. Does the proposed rule duplicate standards already found in state or federal law?

The antidegradation rule is not duplicative of state or federal law.

D. $500, 000 Fiscal Impact

Does the rule have a total estimated impact greater than $500,000 on all regulated persons? Describe the data used and assumptions made in making that determination.

1. Yes, all estimates of the cost of the proposed rule exceed $500,000. Based upon the 80 applications received in 2009 that might be subject to the regulation, a $100 per hour consulting cost and an estimate of 160 hours per application (from the Iowa fiscal analysis), IDEM estimates an annual cost of $1,280,000. The Indiana Manufacturers Association has commissioned an analysis with somewhat different assumptions that estimates annual costs between $3,034,200 and $9,920,000.

2. Indiana Antidegradation Fiscal Impact Analysis table (attachment)

In 2009, Indiana issued 55 new permits; at least 31 of these permits (26 general permits, 2 hydrostatic testing, and 3 ground water remediation) would not be required to undergo individual antidegradation review, so up to 24 new permits may need to meet the new regulation. IDEM also processed 89 permit modifications, at least 35 of these modifications (29 general permits, 5 permit transfers, and 1 name change), would not be required to undergo individual antidegradation review, so up to 54 permit modifications may need to meet the new regulations. Based upon this analysis of new and modified permits, up to 54+24 = 78 permits may be subject to the new anitdegradation procedures in the proposed rule. This number of permits is rounded to 80 in the calculations described above.

The state of Iowa's Fiscal Impact Statement prepared in 2008 for its antidegradation rulemaking determined that, based on an annual low number of 104 and a high of 164 permit actions, the overall range of annual costs to the regulated sector created by the rule would be $428,875 to $2,628,100, plus an additional $75,363 to $115,978 cost to the state's environmental department for an expected necessary one additional experienced environmental engineer. Iowa's costs impact to the regulated sector includes municipal construction projects, new or expanded discharges, most of which under Indiana's antidegradation rule would be exempt from having to do an antidegradation demonstration if the reason for the project is to provide sewage treatment to an expanded population or to meet requirements under the municipality's long term control plan, which are the usual reason for municipal construction projects.

Iowa developed its costs based on an engineering consultancy fee of $100 per hour multiplied by an assigned number of hours established for high or low cost scenario situations and then figured the high and low range of the rule's fiscal impact by multiplying by the number of permit actions (104 or 164). Iowa used a fee of $25 for public notice costs for both the high and low cost scenarios. Iowa's fiscal impact statement was determined based on assumptions made from the state's experience with "consulting engineers, department engineers, and other states' cost estimates." The fiscal impact statement includes the following statement: "Some situations may not require detailed analyses and result in less cost while others will require much more analysis and public involvement and result in higher costs. At this time, there is no way to accurately determine which projects will or will not require more analysis and which projects may or may not be controversial."

Indiana has the same dilemma of having only assumptions on which to base a fiscal analysis; however, the Iowa fiscal impact statement is presented to show how widely it differs from the cost analysis provided by regulated entities who supplied their anticipated costs under Indiana's rule.

E. Sources used in determining costs and benefits, including studies to support the policy rationale and types and quantifications of the costs and benefits.

1. Request for fiscal impact information e-mail sent to antidegradation stakeholders on January 29, 2010.
2. Fiscal impact information letters received:
   Environmental Coalition (submitted by the Environmental Law & Policy Center)
   Indiana Energy Association (regulated entity)
   Indiana Manufacturer's Association (regulated entity)
3. Iowa's Fiscal Impact Statement, October 27, 2008

TITLE 327 WATER POLLUTION CONTROL BOARD

FIRST NOTICE OF COMMENT PERIOD
LSA Document #08-764

DEVELOPMENT OF NEW RULES AND AMENDMENTS TO RULES CONCERNING ANTIDEGRADATION STANDARDS AND IMPLEMENTATION PROCEDURES

PURPOSE OF NOTICE

The Indiana Department of Environmental Management (IDEM) is soliciting public comment on new rules and amendments to rules concerning antidegradation standards and implementation procedures. IDEM seeks comment on the affected citations listed and any other provisions of Title 327 that may be affected by this rulemaking.

CITATIONS AFFECTED: 327 IAC 2-1.3; 327 IAC 5-2-11.2; 327 IAC 5-2-11.3; 327 IAC 5-2-11.7.

AUTHORITY: IC 13-18-2-1; IC 13-18-3-1; IC 13-18-3-2; IC 13-18-3-11; IC 13-18-4.

SUBJECT MATTER AND BASIC PURPOSE OF RULEMAKING

Basic Purpose and Background

The Clean Water Act (33 U.S.C. 1313(c)) under Section 303(c) specifies that a review of state water quality standards must be done at least every three years. Federal rules require states to develop, adopt, and retain a statewide antidegradation policy regarding water quality standards and establish procedures for its implementation. Additional requirements affecting antidegradation rules come from the Indiana General Assembly's requirements found in IC 13-18-3 enacted in the 2000 legislative session under Public Law 140-2000 (also known as SEA 431).

Antidegradation has been considered in rules previously started by IDEM in 1997 (LSA Document #97-1) and 2003 (LSA Document #03-44). Those rules were stymied with controversy and each has been withdrawn. This First Notice of Comment Period will commence the rulemaking process anew and review and consider additions and modifications to Title 327 concerning antidegradation standards and implementation procedures while applying the provisions of IC 13-18-3.

Alternatives To Be Considered Within the Rulemaking

Alternative 1.

Earlier antidegradation rulemakings considered whether or not to extend antidegradation requirements to all surface waters of the state as opposed to maintaining the current antidegradation requirements only applicable to surface waters of Indiana's portion of the Great Lakes Basin. This rulemaking will propose to apply antidegradation requirements to all surface waters of the state.

Alternative 2.

The issue of de minimis has been a difficult subject throughout the history of Indiana's antidegradation rulemakings. This rulemaking will propose a definition of a de minimis discharge that will not be subject to further antidegradation review.

Alternative 3.

De minimis technology-based effluent limitations (DTBELs) are proposed in this rulemaking. The establishment of DTBELs, based on either the federal effluent guidelines or by IDEM's best professional judgment of the best available treatment for pollutants that are not included in the effluent guidelines, will allow antidegradation to be assessed for pollutants without water quality criteria, which cannot be assessed under the current rules that do not address these pollutants.

Alternative 4.

This rulemaking will propose to expand the social or economic justification to include the positive benefits to the area of the discharge as well as the negative impacts that have been considered under the existing rules.

Alternative 5.

This rulemaking will propose, based on IC 13-18-3-2, that any discharge resulting in a significant lowering of water quality in an outstanding state resource water (OSRW) or exceptional use water (EUW) is required to submit an antidegradation demonstration and support a project that results in an overall improvement of water quality in the watershed of the discharge. The discharger may implement a water quality project in the watershed that results in an overall improvement or pay a fee, not to exceed $500,000, based on the cost necessary to reduce the increased pollutant loading to the background concentration.

Alternative 6.

This rulemaking will review the existing conditions and consider simplifying the conditions that trigger an antidegradation evaluation.

Alternative 7.

This rulemaking will propose changes to the cap and applying a cumulative cap on using the unused loading capacity in a high quality water (HQW) and an OSRW.

Applicable Federal Law

The federal rules require states to have, at a minimum, three tiers of antidegradation. Tier 1 (40 CFR 131.12(a)(1)) protects existing uses by providing the absolute floor of water quality in all waters of the United States. Tier 2 (40 CFR 131.12(a)(2)) applies to waters whose quality exceeds that necessary to protect the Section 101(a)(2) goals of the Clean Water Act (criteria, 33 U.S.C. 1251(a)(2)). In this case, water quality may not be lowered to less than the level necessary to fully protect the "fishable/swimmable" uses and other existing uses. Water quality in Tier 2 waters may only be lowered after a determination is made that allowing lowered water quality is necessary and will accommodate important economic or social development in the area in which the waters are located. Any such lowering must still assure water quality adequate to protect existing uses fully. Tier 3 (40 CFR 131.12(a)(3)) applies to ONRWs where the ordinary use classifications and supporting criteria may not be sufficient or appropriate. States may allow some limited activities that result in temporary and short-term changes in water quality in the ONRW, but such changes in water quality should not impact existing uses or alter the essential character or special use that makes the water an ONRW. Currently, Indiana has no ONRWs.

Potential Fiscal Impact

The proposed alternatives are provisions required by or developed with regard to the requirements of IC 13-18-3 (SEA 431); therefore, as rule requirements, they provide no additional fiscal impact beyond that which is required under statute. As a concept, antidegradation only applies to a subset of wastewater dischargers, those who intend to create a new or increased discharge and cannot meet a de minimis increase. Anticipating which or how many dischargers, if any, will be affected by antidegradation is entirely speculative. It may be that no existing or new dischargers will be affected by antidegradation because a discharger can make choices to prevent triggering an antidegradation review.

Indiana's current antidegradation requirements were developed under the Great Lakes Initiative of the 1990s and apply only to dischargers to the Great Lakes System. This rulemaking proposes to implement antidegradation rules across the entire state. Dischargers outside of the Great Lakes System have not previously been required to comply with antidegradation rules and could experience a new cost associated with a new or increased discharge with regard to meeting antidegradation requirements. The fiscal impact to any discharger that triggers an antidegradation review will depend on the type of discharge, the receiving waterbody, and other variable characteristics. Accordingly, the extent of fiscal impact to a discharger could vary widely from another discharger. The General Assembly may have envisioned the fiscal impact per discharger to be limited to $500,000.

The following requirements established by IC 13-18-3-2 for certain anitdegradation requirements for OSRWs apply to a discharger that has proposed a new or increased discharge to an OSRW and completed an anitdegradation demonstration:

(1) implement a water quality project in the watershed of the OSRW that will result in overall improvement of the water quality of the OSRW; or

(2) pay a fee, not to exceed $500,000, to fund a water quality project that will result in overall improvement of the water quality of the OSRW.

Due to the very site-specific nature of any potential water quality project, any estimate of the fiscal impact of that project is highly speculative. Variables that affect the fiscal impact of a project include the type and quantity of pollutants in the proposed discharge and the characteristics of the receiving water. It is anticipated that there will not be a large number of proposed new or increased discharges to current OSRWs. It is also anticipated that there will not be a large number of newly designated OSRWs.

IDEM anticipates that, if a discharger finds that the implementation of a water quality project will result in costs to the discharger in excess of $500,000, it seems likely the discharger will instead take advantage of the option to pay a fee.

If the discharger agrees to accept the effluent limits based on the de minimis lowering of water quality, the discharger will not be required to implement or fund a water quality project. The effluent limits based on the de minimis lowering of water quality are achievable using the best available treatment technology that is readily available. Therefore, requesting effluent limits that exceed the de minimis lowering of water quality is a voluntary action taken by the discharger knowing in advance that it will be required to submit an antidegradation demonstration and implement or pay for a water quality improvement project for a new or increased discharge to an OSRW or EUW.

Small Business Assistance Information

IDEM established a compliance and technical assistance (CTAP) program under IC 13-28-3. The program provides assistance to small businesses and information regarding compliance with environmental regulations. In accordance with IC 13-28-3 and IC 13-28-5, there is a small business assistance program ombudsman to provide a point of contact for small businesses affected by environmental regulations. Information on the CTAP program, the monthly CTAP newsletter, and other resources available can be found at:

www.in.gov/idem/ctap

Small businesses affected by this rulemaking may contact the Small Business Regulatory Coordinator:

Alison Surface, Senior Environmental Manager
IDEM Compliance and Technical Assistance Program
OPPTA - MC60-04
100 North Senate Avenue
W041
Indianapolis, IN 46204-2251
(317) 232-8172 or (800) 988-7901
ctap@idem.in.gov

The Small Business Assistance Program Ombudsman is:

Megan Tretter
IDEM Small Business Assistance Program Ombudsman
MC 50-01– IGCN 1301
100 North Senate Avenue
Indianapolis, IN 46204-2251
(317) 234-3386
mtretter@idem.in.gov

Public Participation and Workgroup Information

An external workgroup has been established to discuss issues involved in this rulemaking. The workgroup is made up of IDEM staff and a cross-section of stakeholders. If you are interested in participating in this workgroup, please contact MaryAnn Stevens in the Office of Water Quality at (317) 232-8635 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted.

If you wish to provide comments to the workgroup on the rulemaking, attend meetings, or have suggestions related to the workgroup process, please contact MaryAnn Stevens in the Office of Water Quality at (317) 232-8635 or (800) 451-6027 (in Indiana). Please provide your name, phone number, and e-mail address, if applicable, where you can be contacted. The public is also encouraged to submit comments and questions to members of the workgroup who represent their particular interests in the rulemaking.

STATUTORY AND REGULATORY REQUIREMENTS

IC 13-14-8-4 requires the board to consider the following factors in promulgating rules:

(1) All existing physical conditions and the character of the area affected.
(2) Past, present, and probable future uses of the area, including the character of the uses of surrounding areas.
(3) Zoning classifications.
(4) The nature of the existing air quality or existing water quality, as the case may be.
(5) Technical feasibility, including the quality conditions that could reasonably be achieved through coordinated control of all factors affecting the quality.
(6) Economic reasonableness of measuring or reducing any particular type of pollution.
(7) The right of all persons to an environment sufficiently uncontaminated as not to be injurious to human, plant, animal, or aquatic life or to the reasonable enjoyment of life and property.

REQUEST FOR PUBLIC COMMENTS

At this time, IDEM solicits the following:

(1) The submission of alternative ways to achieve the purpose of the rule.
(2) The submission of suggestions for the development of draft rule language.

Mailed comments should be addressed to:

#08-764 (Antidegradation)
MaryAnn Stevens
Mail Code 65-40
Rules Section
Office of Water Quality
Indiana Department of Environmental Management
100 North Senate Avenue
Indianapolis, Indiana 46204-2251

Hand delivered comments will be accepted by the receptionist on duty at the twelfth floor reception desk, Office of Water Quality, Indiana Government Center North, 100 North Senate Avenue, Room N1255, Indianapolis, Indiana. Comments also may be submitted by facsimile to (317) 232-8406. Please confirm the timely receipt of faxed comments by calling the Office of Water Quality, Rules Section at (317) 233-8903. Please note it is not necessary to follow a faxed comment letter with a copy of the letter submitted through the postal system.

COMMENT PERIOD DEADLINE

Comments must be postmarked, faxed, or hand delivered by November 14, 2008.

Additional information regarding antidegradation and water quality standards may be obtained from Steve Roush, Permit Technical Specialist, Permits Branch, Office of Water Quality, (317) 233-5747 or (800) 451-6027. Additional information regarding this rulemaking action may be obtained from MaryAnn Stevens, Rules Section, Office of Water Quality, (317) 232-8635 or (800) 451-6027 (in Indiana).

Bruno Pigott
Assistant Commissioner
Office of Water Quality

Posted: 10/15/2008 by Legislative Services Agency
An html version of this document.

Small Business Economic Impact Statement

1. Estimate the number of small businesses, classified by industry sector, that will be subject to the proposed rule:

The antidegradation rule will affect all direct dischargers to surface waters of the state, most notably those that are required to have National Pollutant Discharge Elimination System (NPDES) permits or those with general permits under 327 IAC 15, if a discharger proposes a new or increased loading of a regulated pollutant to a surface water of the state. Based on 2009 permit submissions, assuming that all minor permits are associated with small businesses and are required to perform an antidegradation demonstration, 14 industries, 35 coal mines, 6 pipeline companies, 3 sand and gravel and 1 petroleum terminal may have been subject to this rule. Only the 14 industries may have needed to actually complete an antidegradation analysis as part of their application.

2. Estimate the average annual reporting, record keeping, and other administrative costs that small businesses will incur to comply with the proposed rule:

This rule does not have annual reporting, record keeping, or other administrative costs.

3. Estimate the total annual economic impact that compliance with the proposed rule will have on all small businesses subject to the rule:

Based on 2009 permit submissions, assuming an average consultant cost of $100 per hour, the cost per application would be $16,000 and the total onetime cost to small businesses would be no more than $224,000. It is possible that new or increased discharges from a small business would meet the de minimis exemption of 327 IAC 2-1.3-4(c)(1), then such businesses would only need to submit the minimal information to allow the commissioner to verify the proposed discharge is de minimis. In that case, the estimated cost per application is $4,000 and the total onetime cost to small business would be $56,000.

4. Provide justification for any requirement or cost imposed on small business by the rule and not expressly required by the authorizing statute or any other state or federal law:

The Clean Water Act requires states to have water quality standards, including antidegradation standards and implementation procedures that apply to all NPDES permit holders, regardless of their size. U.S. EPA is actively reviewing a petition from a number of environmental groups requesting that Indiana's NPDES permit program approval be withdrawn because Indiana does not have antidegradation regulations that meet Clean Water Act requirements.

Regulatory Flexibility Analysis

1. Identify any less stringent compliance or reporting requirements for small businesses

This rule does not have annual reporting or record keeping requirements. The rule requirements have to do with the onetime preparation of an antidegradation demonstration if a discharger

proposes a new or increased loading of a regulated pollutant to a water of the state. If that antidegradation demonstration is approved by the commissioner to allow the new or increased discharge, then the existing NPDES rules contain the applicable reporting and record keeping requirements. These requirements apply equally to all dischargers, regardless of their size.

2. Identify less stringent compliance deadlines or reporting requirements for small businesses:

This rule does not contain schedules or deadlines for compliance or reporting requirements.

3. Identify any consolidation or simplification of compliance or reporting requirements for small businesses:

This rule does not contain schedules or deadlines for compliance or reporting requirements.

4. Explain if there are performance standards for small businesses instead of design or operational standards imposed on other regulated entities by the rule:

Performance standards are the core of the requirements of the antidegradation rule and are written to guide all dischargers of proposed new or increased loadings of regulated pollutants, regardless of their size.

5. Are there any exemptions for small businesses from any requirements or costs imposed by the rule?

This rule does not exempt an entity due to size. Section 4 of the rule lists the various exemptions from the requirement of preparing an antidegradation demonstration, but, other than the de minimis discharge exemption, which is based on the size or amount of the new or increased discharge of a regulated pollutant, those exemptions are not based on size of the business. Small businesses are more likely to qualify for an exemption from the requirements of the rule.

6. If no listed alternative is implemented, provide a statement that explains the reasons for not choosing the alternatives, including date, studies or analysis relied upon.

The Clean Water Act requirements are based upon the amount of pollution to be discharged, not on the size of the businesses. Indiana's proposed rule does provide reduced requirements for small discharges that might be associated with a small business.

Indiana Antidegradation Fiscal Impact Analysis Permit History

The Office of Water Quality, Permits Branch, supplied the following permit issuance numbers for 2009 (Note that in the antidegradation draft rule there is no distinction between GLI and nonGLI, but the following breakout was provided by the Permits Branch) Permits in italics would not likely be subject to individual antidegradation review:

New Permits Issued	Modification Permits Issued
18 individual permits - new, nonGLI **9 industrial minors** 1 municipal minor 5 pretreatment 2 public water suppl 1 semi public	20 industrial - non GLI **2 major modifications** **1 major modification/transfer** *1 minor name change* *2 minor transfer* **14 minor modifications**
	33 municipal modifications - nonGLI 4 major CSO modifications 6 major modifications 5 minor CSO modifications 4 minor modifications 2 minor revocation/reissue 3 pretreatment modifications *1 pretreatment transfer* *2 semi public transfers* 4 semi public modifications 2 semi public revocation/reissue
26 general permits - new, nonGLI *10 coal* *9 ground water remediation* *5 hydrostatic* *2 sand and gravel*	*28 general permits - nonGLI* *25 coal* *1 hydrostatic* *1 sand and gravel* *1 petroleum termination*
11 new GLI permits **3 minor industrial** 3 pretreatment *2 hydrostatic* *3 ground water remediation*	8 GLI modifications **1 major industrial** 1 major municipal **2 minor industrial** 2 minor municipal 1 pretreatment 1 general permit noncontact cooling water
Total 2009 permit actions	
55 new permits	89 permit modifications

The October 2008 Iowa fiscal analysis used the following rationale:

lower cost scenario at $100/hour consultation/service fee	process	higher cost scenario at $100/hour consultation/service fee
16 hours	Analysis of No Discharge	40 hours
16 hours	Analysis of minimally degrading alternative	40 hours
8 hours	Documentation of social/economic importance	40 hours
1 hour	Public notice activities including participation with response for higher cost projects	40 hours
$25	cost (one time fee) to public notice	$25
Cost per facility		
[41 hours × $100] + $25 = $4,125		160 hours × $100] + $25 = $16, 025
Number of projects annually		
104		164
Total fiscal cost annually		
$428,875		$2,628,100